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Report to the Attorney General of
Ontario on the Office and Function
of Justices of the Peace in Ontario.

By: Alan W. Mewett

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REPORT TO THE ATTORNEY GENERAL OF ONTARIO

ON

THE OFFICE AND FUNCTION OF
JUSTICES OF THE PEACE IN ONTARIO

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LETTER OF TRANSMITTAL

The Honourable R. R. McMurtry, Q.C.
Attorney General of Ontario,
18th Floor,
18 King Street East,
TORONTO, Ontario.

Dear Mr. Attorney:

I have the honour to submit the first part of my report to you on the office and function of Justices of the Peace in Ontario.

My Terms of Reference were:

Inquire into and report upon the jurisdiction, structure, organization, administration, and operation of the office of Justice of the Peace in Ontario and, without restricting the generality of the foregoing, to study such matters affecting the office of Justices of the Peace as:

- ✓ (1) The nature of the office of Justice of the Peace in terms of judicial and administrative functions;
- (2) The growth in significance and responsibility of the office of Justice of the Peace, particularly as a result of the policies implemented by The Provincial Offences Act, 1980 and The Provincial Courts Amendment Act, 1979;
- ✓ (3) Judicial and administrative guidance and supervision of Justices of the Peace;
- (4) Appointments, removal and discipline of Justices of the Peace;
- ✓ (5) Training and education;
- (6) Workloads, remuneration and working conditions;
- ✓ (7) The relationship between the Justices of the Peace and other elements of the administration of justice, the Provincial Courts (Criminal Division), the Provincial Courts (Family Division) and the Crown Attorneys;

(8) A method of structuring, guiding and controlling the discretion exercised by Justices of the Peace in matters such as issue of process and subpoenas and the approval of sureties and interim release of accused persons;

(9) The legislation affecting the office of Justices of the Peace; and

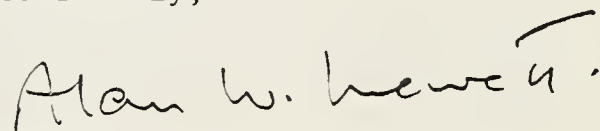
(10) Special considerations that apply uniquely to Justices of the Peace serving remote areas and native communities.

You required me to report by the end of August, 1981. However, while all the general remarks I make are applicable to all parts of the Province, there are special problems and considerations that arise in connection with remote areas and native communities.

Rather than wait until that part of the report can be completed, I have submitted to you my report covering items (1) to (9) of the Terms of Reference and will submit to you separately a further report on item (10) dealing specifically with remote areas and native communities.

I am, Sir,

Yours truly,

A handwritten signature in dark ink, reading "Alan W. Mewett". The signature is written in a cursive style with a prominent flourish at the end.

Alan W. Mewett,
Professor of Law.

Encl.



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ACKNOWLEDGEMENTS

In writing this report I have received nothing but cooperation and assistance from all those people whom I approached or who offered me whatever help they could give. I acknowledge that assistance and was greatly heartened by the feeling I had that everyone connected with the administration of justice in this province has the highest and most laudable objective in developing a system that best combines efficiency and convenience with justice of a high quality.

All the officials in the Ministry of the Attorney General gave me the fullest access to all files and reports and gave freely of their time. The Provincial Court Judges (particularly the Chief Judges and the Associate Chief Judges) as well as the Executive of the Provincial Judges' Association spent many hours preparing briefs and talking to me. The Ontario Crown Attorneys Association and many individual Crown Attorneys were most helpful, as was the Ontario Court Administrators' Association.

Above all, of course, I owe a great debt to the Justices of the Peace in this Province. I cannot name them individually but the Executive of the Ontario Justices of the Peace Association and the Executive of the Toronto Justices of the Peace Association were of invaluable help in particular and I should like to thank both them and all those individual Justices of the Peace who took the time to write to me, to come and see me and to fill in questionnaires.

There are others I shall have to thank when I submit the final part of this report on Justices of the Peace in remote areas and native communities.

I should also like to acknowledge the assistance of my research student, Michael Taylor, in the preparation of this report.

(1) English Background

The office of Justice of the Peace extends back well over six hundred years, though, in origin, it was considered to be an office as Keeper of the Peace, rather than Justice of the Peace*. Some trace of this origin is still to be found; a Justice of the Peace is a peace officer under the provisions of the Criminal Code; a justice may, under the Code, though not in practice in Ontario, "read the Riot Act"; there is still a power to bind a person over to keep the peace.

The year 1361 seems to mark the appearance of the true Justice of the Peace, in an Act of Edward III appointing "one lord and with him three or four of the most worthy in the county, with some learned in the law ... to restrain offenders, rioters and all other barrators and to pursue, arrest, take and chastise them according to their trespass and offence ... and also to hear and determine at the King's suit all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid". In 1388, the number of Justices of the Peace assigned to each county was increased to six and in 1390 to eight. To define better the phrase "most worthy", in 1439 it was enacted that a Justice of the Peace must own property in the county with at least £20 per annum, unless they were "learned in the law". This property requirement was increased over the centuries, until in 1906 all property requirements were abolished.

The period between the 14th century and the 18th century saw a refinement and more precise definition of the role of the office both as regards its judicial function and its peace-keeping function. It is unnecessary to trace in detail this history, since what is of concern is the position at its reception into Ontario. By about the mid-18th century, the judicial function of the justice depended upon a number of

* For several hundred years, until the reforms of the 19th Century, one of the most important functions of the Justice of the Peace continued to be his supervision and control of the "police" in his jurisdiction.

factors. A single justice could try many minor criminal offences such as vagrancy or absence from church; he could hold what are now called preliminary inquiries in order to determine whether to commit an accused for trial. Two justices sitting together had wider powers to hear more serious offences.

But the powers of justices also depended upon whether any one of them or more were "learned in the law". If this were the case, the justice or justices were given even wider jurisdiction; by, however, the 17th century, many justices were appointed to be part of this Quorum (as those justices who were learned in the law were termed) who, in fact, had no legal training and by the 18th century, the requirement had become virtually obsolete.

One further point should be noted before we turn to Ontario. While present day English Justices of the Peace are for the most part unpaid volunteers (the exception being the stipendiary magistrates sitting usually in the larger urban areas who generally have all the powers that two or more justices sitting together have), as early as 1388 there was provision for justices, apart from those who were "lords" to receive fees - originally 4 shillings a day, to a maximum of 12 days per year. Insofar as it is even remotely possible to translate that into modern values, it would represent about \$150 per diem. This sum, while not lavish, was considerably more than merely nominal. As time went on, of course, 4 shillings a day did become purely nominal and, in practice, had ceased to be paid by the 18th century on anything like a systematic basis. Remuneration of voluntary Justices was not actually abolished until 1854 in England. One should not, therefore, think that providing a salary for Justices in Ontario, or providing that they be remunerated on a fee basis does not have considerable historical precedent.

What is more germane, for our purposes, then, is the reception of criminal law and procedure into Upper Canada as of September 1792. The Justice of the Peace system, as it then existed in England, is the original basis of that now in Ontario.

(2) Ontario Background

By virtue of the Royal Proclamation of October 7, 1763 the law of England, both civil and criminal, was imposed upon all the territories of what subsequently became Canada. A Proclamation to Governor Murray of November 4, 1763 stated:

And we do hereby grant unto you full powers and authority to constitute and appoint ... justices of the peace.

In 1800 the legislature of Upper Canada adopted the criminal law of England as it stood on September 7, 1792. As of that date, Justices of the Peace in England had enormously wide jurisdiction, ranging up to the trial of all felonies and misdemeanours, with very few exceptions, and some appellate jurisdiction. In 1832, the legislature dealt with summary proceedings before Justices of the Peace and provided for their protection in the performance of their duties. Standard forms for recording convictions were introduced; the procedure dealing with informations was standardized and provisions made for the enforcement of findings. An Act of 1833 dealt with bail and recognizances and in 1834 provision was made for the granting of fees.

During the period of Union of the Province of Canada (1841-1866), a number of procedural provisions were introduced relating, for example, to the recording of depositions, the remittance of money to the Treasury and so on. In 1842 the qualifications for a Justice of the Peace were established. Justices were to be "the most sufficient persons" owning a minimum of £300 in property, as to which they had to take an oath. In 1846 an exception was made for Justices of the Peace appointed for areas not falling within distinct divisions - the first sign that it was not always possible in the conditions existing in "Canada" simply to adopt the English system.

A uniform rate of fees to be paid to Justices of the Peace was established in 1851, when the old fee schedule of 1832 was repealed. In recognition of the increased duties falling upon Justices of the Peace two separate Acts of 1853 defined the duties and powers of a Justice of the Peace in respect of summary convictions and of indictable offences. The Justices Protection Act of 1853 restored the provision that had been repealed in 1832 that a plaintiff was required to show malice in any action against a Justice of the Peace in connection with his office.

In the 1850's problems were beginning to arise in two areas. An Act of 1842 had listed the qualifications of Justices of the Peace. This was amended in 1856 and again three years later in 1859. A property qualification was still required but clearly there was disagreement as to what this qualification should be and what safeguards should be adopted to show that it had been met. Similarly, an Act of 1846 had provided for the appointment of justices in the more remote part of the Province

and this was amended in 1852 and again in 1859. It seems there were difficulties in providing suitable magistrates in some parts of the Province.

The modern history of the office in Ontario begins, of course, in 1867, the first problem being the constitutional authority over Justices of the Peace. It was fairly quickly established that the power to appoint and set qualifications for Justices of the Peace rested with the provinces (R. v. Bennett (1882), 1 O.R. 445; R. v. Bush (1888), 15 O.R. 598; Re R. v. Isbell (1928), 50 C.C.C. 81). In 1868 the Act respecting the Appointment of Magistrates gave the Lieutenant Governor in Council general appointment powers, and cancelled all previous Commissions upon the issuance of a new one. By this time, a new judicial officer had made his appearance - the Police Magistrate, the forerunner of today's Provincial Court Judge (Criminal Division) - in many of the larger towns, who was in the process of assuming many of the powers and functions of local Justices of the Peace and also in 1868, the powers of Justices of the Peace were limited in those towns where there was a Police Magistrate. By 1873, the presence of Justices of the Peace was no longer required to constitute proper county court sessions of the peace.

A number of Acts of the 1870's and 1880's dealt with procedural matters, security for costs, appeals and so on, which need not concern us here, but in 1891 there was yet another Act respecting the Qualifications of Justices of the Peace cancelling the Commissions of unqualified Justices of the Peace and providing that all subsequent appointees had to meet the qualification requirements within three months of their appointment and in 1897 there was again a Qualifications Act. Clearly the whole matter of the qualification requirements was becoming a tedious problem. In 1916 these qualifications in respect of a territorial appointment became less stringent and in the Justices of the Peace Act of 1935 all references to minimum property qualifications were repealed.

Meanwhile, the increasing number of "police magistrates" was reducing the actual trial jurisdiction of Justices of the Peace. By 1936, they had been stripped of their trial functions save when acting under the direction of a magistrate or the Inspector of Legal Offices. In 1944, any person desirous of being appointed a Justice of the Peace who was not legally qualified was subject to examination as to his qualifications.

Finally, in 1952 the Justices of the Peace Act consolidated and reenacted all previous statutory provisions and

while it has since often been amended and revised, it is that Act that remains the basis of the present system.

(3) Prior Inquiries

Before I turn to the present situation, reference must be made to two previous reports dealing with the office and function of the Justice of the Peace in Ontario.

As part of its Report, the Ontario Royal Commission Inquiry into Civil Rights (the McRuer Commission) dealt at some length with Justices of the Peace. It recognized that in the early history of the Province there was a necessity for Justices of the Peace to administer justice on the local level but with population growth and improvement in transportation facilities many of their functions have been assumed by a trained and organized judiciary. Ontario never did have the tradition of local county squires willing to perform judicial functions out of a sense of duty, and Justices of the Peace in Canada expect and receive remuneration for their duties.

It condemned the appointment to the office of Justice of the Peace as a political reward and recommended that all previous commissions be cancelled and that the province start anew. A uniform appointments system should be adopted based on the advice of the senior magistrate in each jurisdiction, after the requisite number of Justices of the Peace for each area has been fixed by an Order-in-Council. All Justices of the Peace should be under the supervision of the senior magistrate, who in turn would report to the Attorney General. All Justices of the Peace should be treated as judicial officers in respect to security and tenure.

The Commission further recommended a uniform training system so that no layman without training be allowed to hold office.

At that time, 83 Justices of the Peace were salaried, the rest being paid on a fee basis. The Commission stated:

The payment of judicial officers on a piece-work basis necessarily diminishes the public respect for law and order. The fee system is a real inducement to justices of the peace to curry favour with police officers in order to 'get business'.

It pointed out that in many cases the amount of money they made depended directly upon their retaining the good-will of the police.

Hence the Commission recommended that the fee system be abolished and that each Justice of the Peace receive a fixed salary based upon the amount of work he would be required to do. This could be assessed by considering work done in past years, and be subject to revision.

The 10 recommendations were:

- (1) The whole system be reorganized;
- (2) A Justice of the Peace structure be established for each magisterial jurisdiction;
- (3) All present appointments be cancelled, individuals reviewed and only those qualified be reappointed;
- (4) Qualification should be the sole criterion for appointment;
- (5) Appointments be made to a magisterial jurisdiction, though duties may extend beyond that jurisdiction;
- (6) Each local senior magistrate be given supervisory powers of Justices of the Peace in his jurisdiction;
- (7) If a Justice of the Peace dies or is absent from his duties for more than 30 days, the Attorney General shall be notified;
- (8) All Justices of the Peace be paid on a salary basis - full-time or part-time depending upon work;
- (9) There be mandatory training and refresher programmes;
- (10) Justices of the Peace be given a more meaningful share of the workload to relieve magistrates of some of those duties within the competence of a Justice of the Peace.

Following this Report, many of its recommendations were, in fact, implemented. In 1968, the senior Crown Attorney prepared a training manual for Justices of the Peace and in 1970 the salaries and working conditions of full-time Justices of the Peace were established by Order-in-Council. In 1971, the fee system was put on a more rational basis (but retained) and justices were given additional powers to adjourn cases in the absence of the trial judge.

In 1973, the Ontario Law Reform Commission published its Report on the Administration of Courts in Ontario which contained a chapter on Justices of the Peace. This echoed many of the points previously made in the McRuer Commission, which indicated that many of the problems perceived in 1968 had still

not been resolved in 1973. Again there was a call to put the office on an established and organized basis. Some Justices of the Peace by this time were in receipt of province-wide commissions while some were appointed for a particular jurisdiction. There were still full-time salaried Justices of the Peace but most were still paid on a piece-work fee basis. Furthermore, the entire problem of their relationship to the provincial court system needed clarification. It noted that, in spite of the McRuer recommendations to make a fresh start, even more Justices of the Peace had been appointed so that it was now difficult to determine how many Justices of the Peace there were in the province and what functions each of them performed.

The Commission recommended that Justices of the Peace be appointed as a group for each district in Ontario, the number to be set by regulation with jurisdiction limited to that district. Any powers given to Justices of the Peace whether under the Code or under provincial statutes should be exercised only under the supervision of the appropriate Provincial Court Judge (as magistrates had become). The Commission envisaged that the judge would assign to a particular Justice of the Peace a particular duty in which he would then develop some expertise. This would also have the effect of closer control over Justices of the Peace. Since s. 6 of the then current Justices of the Peace Act did not provide sufficient control in practice, it should be replaced by a provision that a Justice of the Peace was to exercise only those duties assigned to him by the appropriate Provincial Court Judge.

The Commission criticized the provision that Crown Attorneys were "to advise justices of the peace" and recommended that this should be the function of the Provincial Court Judge. It also disagreed with the practice of appointing existing court staff Justices of the Peace so that they continued to hold their civil service appointment as well as Commissions as Justices of the Peace.

It recommended that Justices of the Peace should, whenever possible, be appointed on a full-time salaried basis and in those areas where the work-load did not justify a full-time Justice of the Peace, that Justices of the Peace be appointed on a pro-rata part-time basis. The Commission repeated the criticisms contained in the McRuer Report of the present fee structure and again recommended its abolition but felt that the wholesale revocation of existing commissions as Justice of the Peace would be unnecessary if its recommendations as to a Justice of the Peace only being able to exercise those powers assigned to him by direction of a Provincial Court Judge were

followed. Those not so directed would retain the title and honour but have no powers.

The Justices of the Peace Act then provided that a prospective Justice of the Peace was to be examined as to his qualifications by a County Court Judge. The Commission felt that a Provincial Court Judge would be a more appropriate person to undertake that task.

One major recommendation was the establishment of a Justices of the Peace Review Council to be composed of the Chief Judge of the Provincial Court, another Provincial Court Judge, a Justice of the Peace and 2 other appointees at large. The function of the Council was to be similar to that of the Judicial Council - viz. to examine proposed appointees, and to receive and investigate complaints with respect to a Justice's of the Peace performance of his duties. The Attorney General would be required to receive a favourable report from the Council before making any appointment.

Finally, it considered the whole question of adequate training and continuing education which it regarded as being totally inadequate. Responsibility for developing and maintaining proper programmes should rest with the Chief Judge of the Provincial Court as part of his general supervisory role.

Following the release of the Commission's Report several amendments to the Justices of the Peace Act were introduced, though many of these appear to have been under consideration for some time prior to the release of the recommendations of the Law Reform Commission. Potential Justices of the Peace were now to be examined as to their qualifications by the appropriate Provincial Court Judge; Justices of the Peace were to act only when directed by the Chief Judge or a judge designated by him; the office of the Justice of the Peace was subject to the general supervision of the Chief Judge of the Provincial Court. In addition, Section 9 established a Justice of the Peace Review Council composed of the Chief Judge of the Provincial Court (Criminal Division), the Chief Judge of the Provincial Court (Family Division) and the senior provincial court judge of the district concerned (or, in his absence, a judge appointed by the Attorney General), but its functions were to review the conduct of Justices of the Peace and receive and investigate complaints. It had no function in the appointment of Justices of the Peace nor, as can be seen, did its composition agree with that recommended by the Commission.

II. THE PRESENT SITUATION

(a) Powers

A Justice of the Peace, as such, has in Ontario no powers, no duties, and no jurisdiction (save that he is entitled to administer oaths and affidavits and take declarations by virtue of the Justice of the Peace Act) unless and until he is directed by the Chief Judge of the Provincial Courts (Criminal Division) or the Chief Judge of the Provincial Courts (Family Division) or by a Provincial Court Judge designated by either of them to exercise those powers and perform those duties conferred or imposed upon him by an Act of Ontario, or by an Act of the Parliament of Canada or by a municipal by-law*.

I am not entirely convinced of the legality of the practice of commissioning a person as a Justice of the Peace but denying him all duties and powers (save again, the administering of oaths) unless he receives a direction to act and then only in accordance with that direction. The Criminal Code expressly confers on a "justice" considerable powers and sets out in detail what his functions are. "Justice" is defined, *inter alia*, as a Justice of the Peace. I have no doubt as to the power of the Province to set out the powers and duties of a Justice of the Peace and to limit his functions in any way it pleases in relation to provincial offences and provincial proceedings.

In the context of the Criminal Code, however, the Code is quite clear that it confers the powers and duties upon a justice qua Justice of the Peace. The Provincial Justice of the Peace Act then enacts that a Justice of the Peace, in spite of being in every sense of the word, a Justice of the Peace, shall

* Some Justices of the Peace are authorized by Direction to perform marriage ceremonies. Which Justices of the Peace have such a Direction and which do not does not appear to be based upon any rational principle. This does not seem to be a major problem and I have not examined it in this inquiry, but it may be that some further consideration should be given to the question of the issuing of marriage Directions.

not exercise any of the powers or perform any of the duties conferred or imposed upon him by the Criminal Code (among other federal statutes) unless so directed. I have, again, no doubt that the appointment of Justices of the Peace is entirely within the competence of the provincial authority, but whether the Province can appoint a Justice of the Peace and then limit the powers to him by the Federal authority, I find a more difficult problem.

However, I do not find the purpose of attempting to differentiate functions objectionable* - indeed, it seems to me a very practical and sensible way of meeting the difficulties which will be discussed throughout this review. If the present method of achieving this is constitutionally valid, nothing more need be said on this point; if it is not, it would be a simple matter for the commissions of Justices of the Peace to recite for what purposes an individual is to be appointed a Justice of the Peace, so that he would have a limited commission rather than a general commission; even more simple would be for the Criminal Code to define "justice" not simply as a "justice of the peace" but as a "justice of the peace when acting in accordance with the powers and duties conferred or imposed upon him". In any event, I propose to assume in this review either that there is no problem with the constitutionality of the direction system, or, if there is, that it can easily be remedied.

Of the approximately 730 persons presently holding commissions as Justices of the Peace in Ontario, some 600 or so have received directions. The remaining 130 are to be classified as inactive or retired. I shall return to considering these persons later on. Thus, 600 are "active", though "active" in this context may range from the full-time (perhaps even overworked) to the part-time (indeed virtually inactive).

There are 5 types of Directions, classified as A Expanded, A, B, C and D. At the time of writing, approximately 175 Justices of the Peace have A Expanded or A Directions.

A Expanded is the widest form of direction and confers on the Justice of the Peace all the powers and imposes all the duties set out in the Acts of the Legislation, the Acts of Canada and municipal by-laws, save that he cannot,

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- (a) hear and determine prosecutions under any Act of the Parliament of Canada other than under Section

* Save as discussed below. And it may be unnecessarily complicated.

- 238(1) of the Income Tax Act, sections 3(1) and 6(1) of the Motor Vehicles Transport Act, the Migratory Birds Act (and Regulations), the Ontario Fishery Regulations (made pursuant to the Federal Fisheries Act) and the Small Vessels Regulations (made pursuant to the Canada Shipping Act);
- (b) hold preliminary inquiries under Part XV of the Criminal Code in respect of an offence under any Act of the Parliament of Canada;
 - (c) hear or proceed with or make any order under any of the provisions of the Criminal Code relating to an accused who may be mentally ill and/or unfit to stand trial;
 - (d) exercise any jurisdiction under the Criminal Code, Sections 68 ("reading the Riot Act"), 464(2) (putting an accused to his election), 464(3) (endorsing the information), 471 (remanding an accused charged with an offence committed in another jurisdiction) or 727 (proceeding as for an indictable offence in certain cases of common assault, virtually obsolete).

A category A direction, in addition to the above exclusions from powers and duties also excludes:

- (e) Those offences under Acts of the Parliament of Canada and Regulations which a Direction A Expanded Justice may hear and determine.

A category B direction, in addition to the above 5 exclusions also excludes:

- (f) The hearing and determination of prosecutions under an Act of the Legislature and any By-law of a municipality.

A category C direction, in addition, excludes:

- (g) The carrying out of any of the provisions of the Criminal Code relating in the release of persons who have been arrested for any offence.

Finally, a category D direction also excludes:

- (h) The receiving of any information and/or report in writing requesting a search warrant or the issuing of any search warrant or the making of any related order.

Thus, in reality, the functions and duties (and hence the powers) of a justice in Ontario range from the limited one of receiving information relating to the commission of an alleged offence and issuing process thereon and adjourning cases in the absence of the trial judge, up through various stages to a justice with power to hear and determine various offences, to conduct bail hearings, to issue search warrants, to issue process and so on.

No Justice of the Peace in Ontario, even the A Expanded full-time sitting Justice of the Peace, may therefore hold preliminary inquiries, hear or proceed with any Criminal Code matter involving a person who may be mentally ill or unfit to stand trial or hear prosecutions under federal statutes, except for a few specified ones.

The distinction that is sometimes drawn between a "signing" Justice of the Peace and a "sitting" Justice of the Peace, while convenient in general terms, is therefore, not very helpful precisely to delimit functions. A sitting justice has adjudicative powers while a signing justice merely has the direction C or D powers, but even a direction D justice must act judicially in considering informations, etc., so that if this classification purports to draw a distinction between the so-called administrative and judicial functions of the Justice of the Peace, it is in my opinion, misguided.

Another classification that is adopted and will be referred to throughout this review is that of Public Servant Justices of the Peace, Civil Servant Justices of the Peace and Fee Justices of the Peace. All Justices of the Peace are appointed by Order-in-Council, but a public servant has no other appointment, save that of being a full-time justice. A civil servant, on the other hand, has an appointment within the civil service, in addition to his commission as a Justice of the Peace. Usually he will be a court administrator or other court officer. It is the practice that his salary is geared to the civil service scale save that he is automatically raised one level upon receiving his commission. I shall have more to say about the Civil Service Justices of the Peace later on, but there is considerable variance in the proportion of their time devoted to Justices of the Peace functions. Some operate as Justices of the Peace to the detriment of their civil service responsibilities; some only occasionally function as Justices of the Peace and spend most of their time as civil servants. Most are between the two extremes. Often, a civil service Justice of the Peace will resign his civil service position but retain his commission when the reason for his appointment has disappeared. A fee Justice of the Peace is one not nominally appointed on a

full-time basis, but one who receives a fee for service based on the rates set out in the Regulations. Again, I shall have to say more about those rates and about the concept of fee payments at a later stage, but fee Justices of the Peace may range from the virtually full-time (indeed, a fee Justice of the Peace can, if he is willing to make himself available and put in the necessary hours, receive considerably more in the way of income than a full-time salaried Justice of the Peace) to a justice whose services are utilized only very occasionally to the extent of deriving an annual income of only \$200 or so. These Justices of the Peace may hold other full-time employment, they may be retired and in receipt of a pension or they may regard their fees as their sole or major source of income.

There are also variations of one sort or another. In Metropolitan Toronto, five Justices of the Peace are paid an annual retainer of \$10,500 and are on call from midnight to 6:00 a.m. as Night Bail Justices of the Peace (and are thus fee Justices of the Peace with an additional retainer recognizing the exceptional nature of their work). Three Justices of the Peace are paid an annual retainer of \$2,600 in order to be available to act as Bail Justices of the Peace on weekends and statutory holidays in the York Region.

Last year, in recognition of the pressing need for further Night Traffic Court Justices of the Peace in the Toronto area, eight persons were appointed Justices of the Peace, who seem to have adopted the title of "per-diem justices of the peace", though the title is not very accurate. They are persons employed full-time in the civil service as clerks or court reporters who sit once, twice or occasionally three evenings a week for approximately two hours or so, at the regular rate of \$45 for the first hour and \$10 for each additional half-hour. They seem to have A or A Expanded directions but have been told, apparently verbally, that they are not to function in any capacity as a Justice of the Peace save when assigned to sit in Night Traffic Court.

Another sort of "per diem" Justice of the Peace is also called a "casual" employee under The Public Service Act. He is appointed specifically as a "Night Bail Justice of the Peace", at a salary bordering on the ludicrous, to be available for bail hearings (and other duties) usually between the hours of midnight and six a.m. for several nights a week that total some 150 or so nights a year. His remuneration appears to be considerably less than that of other Justices of the Peace though, in view of the importance of his duties in the Toronto region it is difficult to see why.

As can be seen, the "classification" of Justices of the Peace is chaotic, as are the various methods and levels of remuneration. Some are full-time, some fee paid. A few have annual retainers. Some are civil servants, some are public servants, "Per-diem Justices of the Peace" seem to be Justices of the Peace only a couple of evenings a week. Some are sitting Justices of the Peace, some are signing Justices of the Peace. Some have A Expanded directions, some only D directions and the rest are anywhere in between. The system is hopelessly confused and unnecessarily complex.

(b) Appointment

It will be seen that in any question involving the "appointment" of a justice, two distinct matters must be borne in mind, viz. his appointment as a justice and the issuing of directions to him. His appointment as a justice is a necessary prerequisite to his receiving a direction, but, in itself, does nothing except confer the title and enable him to administer oaths. His appointment as justice is by Order-in-Council, upon the recommendation of the Attorney General but what is of more immediate concern is the process whereby a person is nominated by the Attorney General for appointment by Order-in-Council - the selection process as it might be called.

The first criterion must be need and the present scheme presupposes no one is better situated to make the first assessment of whether a particular area needs a replacement or an additional justice than the local Provincial Court Judge, or, in Toronto, the Chief Judge. The first question that must be resolved, therefore, is whether anyone at all should be appointed. Ultimately this will be decided by the Attorney General on the advice of his officials. This will involve a consideration of the workload in the area, the necessary availability of justices to service that area and the financial aspects. The local judge will be involved as will the Chief Judge and the Associate Chief Judge, the permanent officials in the Ministry, and others, either on a formal or informal basis, and the decision will be made.

Once it has been determined that there is a vacancy, the problem of selecting an individual then arises. At this stage, let me state that the process I am about to describe is the one that is normally followed in most cases; it is not universally true, nor is it a process that I necessarily think should be followed, but I should like to postpone a consideration of alternatives and an evaluation of the present process until a later chapter.

The local Provincial Court Judge (or in Toronto the Chief Judge) being in the best position to consider need, is also considered to be in the best position to consider which individual should be appointed. He is likely to know who is interested and available; he is likely to have observed him and formed some estimate of his capabilities; and, at least, he is the one who will probably have to work closely with him if he is appointed. It is not surprising, therefore, that a name will be put forward in the first place by the local Provincial Court Judge. Under the Justices of the Peace Act (Sec. 2(2)) a person considered for appointment as a Justice of the Peace shall be examined in regard to his qualifications by the local Provincial Court Judge and no person shall be appointed without a certificate from that judge that he finds him qualified. While this is the most common procedure, it is not universal.

The first step, once a name has been decided upon is, therefore, to enquire into that person's qualifications. Unfortunately, it is not clear what "qualifications" mean in this context, and this is a matter in which I shall have much more to say later on, but some sort of assessment of the nominee will be made by the local Provincial Court Judge and he will forward his name to the ministry, where it will again be subject to scrutiny by ministry officials. If this dual assessment is satisfactory, the nominee will be a person who is reasonably educated, of good moral character, possessing sufficient intelligence to understand the duties and functions of a Justice of the Peace and capable of learning the basic legal and statutory provisions with which he will have to deal.

Indeed, whether this procedure is actually formally followed or not may well depend, and does depend, upon the background of the proposed appointee. As will be seen in the next section, a candidate may be an "outsider" or a person from "within the system". If the candidate is already well known to the judge as a court reporter or court clerk, the examination as to qualifications may be quite perfunctory; if he is someone with no previous courtroom experience of any kind, the examination is likely to be more substantial. In fact, it should make no difference if "qualifications" is to be given the meaning that, as I shall discuss, it should be given. The knowledge of the superficial trappings of the system does not make a person more "qualified" than one with no such knowledge but a considerably keener appreciation of the functions of a Justice of the Peace.

Before his name is forwarded to the Attorney General for his approval and the drafting of the Order-in-Council, there is a political input which cannot be ignored though I am bound

to say immediately that I do not consider the political input to be undue, though whether it is, in the abstract, totally desirable will be considered later. A person representing the government policy in the locality concerned (perhaps an M.P.P. or a party organizer) will be contacted to see whether he has any objections to the name going forward, or whether perhaps he can suggest a more suitable candidate. There is no evidence that this amounts to gross political patronage. Rather it is an attempt to ensure that the nominee is acceptable to the government and to ensure smooth adoption of the Order-in-Council. It is, of course, true and cannot be denied that there always exists the danger that in isolated cases, the local politicians may attempt to exert undue pressure and see his function as the distribution of patronage, but in the files I have examined this is simply not so. In any case, the Attorney General, as the Law Officer of the Crown, guards against undue and improper attempts to exert pressure.

Finally, the Attorney General will give his approval, the Order-in-Council prepared and the nominee will receive his Commission as Justice of the Peace.

Now, however, comes the more difficult problem of issuing the Direction, without which the justice cannot act. The appointment of Justice of the Peace is, under the present system, for life (subject to revocation, which I will discuss later), but that means little without a direction to act. Clearly one basic consideration of which direction is to be issued lies in the particular needs of the locality when the appointment is made. The need may range anywhere from a sitting justice to hear and determine charges to a justice merely to receive information and issue process. Thus what matters is a particular justice's capability of performing those duties which the direction entails. "Qualification" really entails two considerations viz. the qualification to be a justice in the first place and, if appointed, the qualification to act in a particular capacity according to the direction issued.

The issuing of a direction is the responsibility of a judge, not of the Attorney General or a ministerial officer. Again, the local judge (or the senior Provincial Court Judge in localities having more than one) will satisfy himself, either by some sort of formal assessment or more informally by observing the justice and talking to him, that he is capable of performing those functions listed in a particular direction. Often he will consult with the Chief Judge or Associate Chief Judge before coming to a decision.

The issuing of directions does not always work well. Directions are unfortunately considered by many to be a question of prestige - the A direction Justice of the Peace being perceived as being higher up the ladder than a D direction Justice of the Peace. There is an unfortunate tendency to issue A directions quite unnecessarily as a kind of reward when a lower direction would quite adequately suffice. Conversely, there are occasions when a D direction only is issued when a higher direction would be quite justified. Similarly, it appears that the local judge does not always seem to realize that being satisfied that a person is qualified as a Justice of the Peace, is not the same as being satisfied that he should have a particular direction. I hasten to add that these are rare instances and that in the vast majority of cases judges do take the issuing of directions very seriously, but even one example of such a misconception is too many.

(c) Who are appointed

From which type of persons Justices of the Peace are recruited (the question of who should be recruited will be considered later), varies according to both the locality and the views of the Provincial Court Judge initiating the appointment. At this stage, it will be as well to point out that, on this question, there seem to be two distinct schools of thought. One view is (and this seems to be the view in Toronto and the larger urban centres) that Justices of the Peace should be appointed from the ranks of those who are already familiar with the workings of the legal process and with the basic court routine. These tend to be persons such as court clerks, reporters, police officers and even secretaries. Assuming that they meet basic educational requirements, it is true that they would be "qualified" in the sense of being familiar with the routine duties and functions of a Justice of the Peace and perhaps with at least superficial legal principles. It is also true that, once appointed, they could more quickly be qualified to receive at least a direction D and, depending on the individual and his background, a higher classification of direction. For reasons that will be discussed, such appointments may give rise to other problems, particularly if they retain their original titular appointment in addition to assuming the office of Justice of the Peace.

The other view is that Justices of the Peace should be appointed from the community at large; that they should be representative of the community as a whole. In some areas, such as native communities, indeed this may be the only type of appointment possible. But even where appointments from within the system are possible, this view would hold that it is preferable

to appoint from outside. It suggests that what should be looked for in a Justice of the Peace is a person of reasonable intelligence, respected in the community and with the quality of being able to make decisions on a judicial basis and that knowledge of or familiarity with the technical workings of "the system" is something that can easily be acquired at a later date. Such persons are seen to be "qualified" not by reason of knowledge of the process but because they are perceived to be persons capable of independent decision-making, capable of picking up the technical and legal expertise.

Which view is correct, or whether neither or both views are correct will be discussed later, because much must depend upon one's perception of the proper function of the Justice of the Peace, his role in the criminal justice system, the training and education that should be provided for Justices of the Peace both initially and on an on-going basis, and financial considerations. At the moment, I am merely stating that in the system as it exists today, both views are held and both types of Justice of the Peace are recruited and appointed.

In the case of fee justices, another problem that may arise is the other employment that such justices engage in while holding their commissions. In general, it is easy enough to state that it should not be one that is inconsistent with holding the office, but it is more difficult to specify precisely what sort of employment that is. Many are retired from regular employment, and the problem may not arise, but many more are employed in a variety of activities. Some types of employment are, in my view, clearly inconsistent with the office of Justice of the Peace - employment as a police officer or within a police department or holding elected office as a mayor or reeve for example. In the long run, the good sense of the Justice of the Peace himself and the control over appointments by the Attorney General should obviate most difficulties.

(d) Training

If we were to look only at the formal provisions made for the training and continuing education of Justices of the Peace in Ontario, the position could only be described as appalling. In practice, one sees that it is less appalling than quite unsatisfactory.

On appointment, a justice will receive a binder containing material relevant to his office. This will include extracts from the relevant portions of the Code, the Provincial Offences Act, the Provincial Courts Act and so on, together with written material explaining some of the provisions. He may also

be given a copy of the Criminal Code of Canada. He is expected either to be or to become familiar with these so as to have or acquire a working knowledge of what is expected of him. That is all the express formal training, if it can be so designated, that is provided for a new Justice of the Peace and the only "education" that he receives. But this only tells a very small part of the real story. While the Ministry has made sporadic efforts to provide training and educational seminars for Justices of the Peace, these have been few and far between. Not all justices were invited to attend them, and some of those invited did not appear.

As a result, the burden of training and educating Justices of the Peace has fallen, of necessity, upon the Provincial Court Judges and the Justices of the Peace themselves. In some localities, the Crown Attorney has also volunteered his services in this area. There is no consistency. Most Provincial Court Judges are acutely aware of the need to have their local Justices of the Peace properly trained and able to function intelligently. They will take the time to observe them, offer them advice and help. In the large urban centres, where conditions warrant it, a more formal program can be arranged. The Ontario Justice of the Peace Association has done its best, with limited resources, to arrange work-shops and discussion programs. The Toronto Justices of the Peace Association (separate from the Ontario body) also hold meetings and seminars. In some localities, a newly appointed Justice of the Peace will undergo an "apprenticeship" period of sitting in or observing more experienced Justices of the Peace.

As a result, one can only conclude that the actual training and education of Justices of the Peace in this province range from the virtually non-existent to the barely acceptable, depending upon the location. Clearly, steps must be taken to remedy this situation.

(e) Remuneration

Justices of the Peace may be,

- (i) Full-time sitting Justices of the Peace, designated public servants, whose salaries range from \$21,425 to \$25,825 with an additional allowance not exceeding \$375 a month for those in Toronto who also act as Night Bail Justice of the Peace. He may also receive added fees for work performed outside normal working hours.
- (ii) Full-time Justices of the Peace (non-sitting) also public servants with a basic salary scale between \$19,100 and \$22,625, plus extras.

- (iii) Full-time civil servants, such as court officials, etc., who are employees of the Ministry but who also hold commissions as Justice of the Peace who receive their appropriate civil service salary (actually appointment as Justice of the Peace automatically promotes them one level in the civil service salary scale), plus extras.
- (iv) Justices of the Peace paid on a fee for service basis at the rate set out in the Regulations made under the Administration of Justice Act ranging from 50 cents for consideration of process on a parking violation to \$45 an hour when presiding over a Provincial Offences Courts. Fees actually paid in total to Justices of the Peace during the last fiscal year range from a low of about \$200 to a high of over \$60,000. This discrepancy clearly is the result of differing workloads - a matter that will be considered later.

One should point out, however, that a fee Justice of the Peace in the upper ranges of remuneration probably has considerable office expenses, particularly in the engaging of secretarial services, so that his actual net income would be much lower than the fifty or sixty thousand dollars indicated. There are a few fee Justices of the Peace in the Toronto area who also receive an annual retainer in consideration of their being available at night or on week-ends or during statutory holidays.

One simply cannot give any precise picture of the general level of remuneration of Justices of the Peace in the province. Some earn virtually nothing and are virtually inactive, while some earn in excess of \$50,000 even though fee Justices of the Peace and are virtually full-time. Salaried justices appear to range from those receiving something under \$20,000 per annum to those receiving something over \$30,000 per annum.

(f) Some statistics*

(i) Justices of the Peace with A Expanded direction:			
	Public Servants		75
	Civil Servants		39
	Fee		64
		TOTAL	178

* Figures, of course, change from week to week and may not be accurate at press time, but the general picture should not be radically different from that presented here.

(ii) Justices of the Peace with A direction:		
Public Servants		6
Civil Servants		54
Fee		84
	TOTAL	<u>144</u>
(iii) Justices of the Peace with B direction:		
Public Servants		1
Civil Servants		34
Fee		100
	TOTAL	<u>135</u>
(iv) Justices of the Peace with C direction:		
Public Servants		0
Civil Servants		4
Fee		76
	TOTAL	<u>80</u>
(v) Justices of the Peace with D direction:		
Public Servants		1
Civil Servants		4
Fee		55
	TOTAL	<u>60</u>
	GRAND TOTAL	<u>597*</u>
(vi) Public Servants		
A Expanded direction		75
A direction		6
B direction		1
C direction		0
D direction		1
	TOTAL	<u>83</u>
(vii) Civil Servants		
A Expanded direction		39
A direction		54
B direction		34
C direction		4
D direction		4
	TOTAL	<u>135</u>

* A few Justices of the Peace have two directions for some reason not readily apparent since the wider necessarily includes the narrower so, again, the actual numbers may vary slightly.

(viii) Fee Justices of the Peace

A Expanded direction	64
A direction	84
B direction	100
C direction	76
D direction	55

TOTAL	379
GRAND TOTAL	597

(g) Workloads

Clearly, the workloads are not evenly distributed across the province, nor, indeed would it be possible for them to be. Metropolitan Toronto may represent one extreme and some remote native community another, with every possible variation in between. If there is no work for a fee Justice of the Peace, his remuneration will be slight; conversely the number of salaried Justices of the Peace, even with some of them working extra hours for additional remuneration, in the larger centres may not be sufficient to handle the workload.

However, I think one is justified in assuming that in the larger areas, the senior local Provincial Court Judge (or the Chief Judge and the Associate Chief Judge in the case of Toronto) will have worked out the needs of the particular locality. These must entail not only the total manpower required but also the availability of Justices of the Peace at times that extend beyond what is regarded as a normal working day or at night or on week-ends and holidays. Disagreements may emerge as to what the needs of a particular locality are but it does not seem that the number of justices in the larger centres is too much of a problem, given the present system. If any suggested reforms are adopted, it may, of course, become necessary to reevaluate the numbers required for any particular locality.

Numbers and availability may be a serious problem in more remote or native areas but the whole question of Justices of the Peace for those communities seems to me best discussed separately and I prefer to leave this topic for later consideration.

What is a problem is not so much the number of justices as the uneven distribution of the workload within the same locality. Where salaried justices are concerned, they must, of course, work under the direction of the Provincial Court Judge, and it appears that the workload is evenly and satisfactorily distributed.

In the case of fee justices a different picture emerges - not so much in the exercise of his function of hearing and determining cases or presiding over bail applications, which are subject to the control of the judge, but in receiving information and issuing process or receiving and determining search warrant informations from which a large part of their fees is derived. Some Justices of the Peace seek the appointment as a means of increasing their income and are disappointed when the extra income does not materialize; some are content to earn a few extra hundred dollars a year and do not wish to put in the time to earn more; some would willingly put in more hours to earn extra fees if given the opportunity; some accept the appointment in the best spirit of public service and accept the fact that their fees do not adequately recompense them for time spent in that service. In short; the motives and reactions of Justices of the Peace to the present situation are as varied as the number of justices themselves.

However, there is a practical aspect to the situation that cannot be ignored and that is that in many locations the fees earned by Justices of the Peace depend upon the number of informations (both search warrants and criminal process) that are sworn before them by the police. I shall have to return to this when I consider the relationship between Justices of the Peace and the police. The plain fact of the matter (and there is no point in concealing the fact or beating about the bush) is that some Justices of the Peace are perceived by some police to be more "cooperative" than others - and "cooperation" in this context means, to such policemen, not being obstructive, not asking awkward questions and not insisting upon a full consideration of the grounds for the application or the complaint. This is nothing more nor less than an invitation to a Justice of the Peace to abdicate his judicial responsibility. Yet it is a powerful weapon in the hands of some police officers (I hasten to add that they may be acting for what they consider to be the best of motives or they may be acting out of malice - the motive is less important than the result, since either view is misguided) to steer, or what is worse, to threaten to steer, all business away from the uncooperative Justices of the Peace to those they consider more cooperative. The outrageous result is that some justices are perceived by both the police and the public to be police Justices of Peace while others pay for their rectitude by receiving little in the way of fees. This is utterly intolerable and reflects a complete ignorance of the proper function and authority of the Justice of the Peace, and must be stopped. If the fee system is to survive, it cannot be dependent upon the good graces of the police.

This is quite a different problem from that of the practice adopted by some police in some localities of "shopping around", that is, of having failed to get one Justice of the Peace to issue process on an information, swearing an identical information before a different Justice of the Peace in the hope of having him issue process. This, in itself, is not necessarily wrong, though in some extreme cases it may approach an abuse of process, but this seems to be a matter for the courts to rule upon.

(h) Assistance, Advice and Direction

In 1751, Fielding wrote with despairing irony, "I own I have been sometimes inclined to think that this office of a Justice of the Peace requires some knowledge of the law". What he would have had to say of the situation in 1981 in Ontario is a matter only for conjecture. Justices of the Peace have no formal legal training and, even with the adequate training and continuing education program which will be proposed at a later stage, questions of law are bound to arise in the course of their duties that they will have to resolve. Jurisdiction to receive informations and to issue process, legal provisions relating to bail and procedural matters that arise therein, not to mention difficult substantive legal questions that arise during the trial of an accused are all matters in which some knowledge of the law and, more particularly, an ability to appreciate the legal questions involved are an indispensable prerequisite for the conscientious Justice of the Peace. It is impossible to estimate with any degree of accuracy how often a Justice of the Peace may be called upon to resolve some legal difficulty - probably for some of them, never; probably for the majority once or twice in their careers; for others, particularly in urban centres where lawyers may be involved, considerably more often. But I think it is fair to say that resolution of legal problems is not a primary function of the Justice of the Peace, in terms of frequency. Without doubt, his primary function is the resolution of factual disputes, whether he sits as a trial judge or bail justice and the weighing of the adequacy of the grounds when he is considering the issuing of process. These functions do not require legal expertise.

He is thus a person who, while not primarily involved in legal disputes, may find himself in the position of having to resolve one. To suggest that all Justices of the Peace should be legally qualified is, to my mind, both impractical and unnecessary. Given proper training and continuing education he should be capable, if in other respects qualified for the appointment in the first place, of adequately handling the routine legal problems that will arise in the course of his duties.

It could be argued that sitting Justices of the Peace should be legally qualified, that any person determining the guilt of an accused, or his fitness for pre-trial release, should have the legal training necessary to enable him to understand points of law, appreciate legal apparatus, rule on the admissibility of evidence and so on. This argument cannot be lightly dismissed and the high standards we now have in the Provincial Court demonstrate the desirability that all presiding judicial officers should be legally trained. I shall say more about this later but, assuming for the moment, that formal legal qualifications are not to be a prerequisite for appointment as a Justice of the Peace, there will always be occasions when a legal difficulty of more than a routine nature arises, and he will need assistance, advice and probably direction.

A Justice of the Peace, no less than a Supreme Court Judge, is entitled to look for assistance in the first place to the parties appearing before him or their counsel. From a practical point of view, however, this source is less likely to be helpful to him than to his more exalted counterpart. The parties may not be represented by counsel; if they are, counsel are likely to be less well prepared; furthermore, even if there is a well presented legal argument, the issues may be too complex to expect a Justice of the Peace without formal legal education to decide unaided. While, therefore, this is a valid and important source of assistance, by itself, it is inadequate.

Under the Ontario Crown Attorneys Act, Section 12(h), it is the duty of the Crown Attorney to "advise justices of the peace with respect to offences against the laws in force in Ontario". I am happy to report that in general the relationship between Crown Attorneys and Justices of the Peace in Ontario seems amicable and beneficial. The general practice seems to be for Crowns not to interfere with the independence of the Justices of the Peace, but at the same time to be ready and willing to offer their advice when asked. Without specifying names, I should also point out at this stage that many of the Crowns have done yeoman service in providing seminars and training programs for Justices of the Peace. It is certainly not their fault if I nevertheless have to conclude that the overall picture of organized training and education of Justices of the Peace in this province is inadequate.

It has often been objected that the Crown Attorney is an inappropriate person to be giving advice to a Justice of the Peace, on the grounds that, as a prosecutor, he should not be advising an independent judicial officer. This objection seems to me to be based upon a misconception of the role of the Crown Attorney. It may well be that he is perceived by the public as

the prosecutorial officer of the state, rather like the District Attorney of American television programs. In fact, as lawyers if not the public should know, the Crown Attorney functions primarily as a sort of local Minister of Justice, with his prosecutorial duties being only one of his many functions. I do not know of any Crown Attorney in this province who would subordinate his duty to act as an impartial agent of the Attorney General to his prosecutorial zeal. I myself see nothing wrong in a Crown Attorney, the local Minister of Justice, giving advice to a Justice of the Peace on legal matters. My criticism of the system lies more in the direction of its unorganized and sporadic nature, depending, as it does, on a justice seeking advice in the first place. Furthermore, a Crown Attorney is not always within easy reach of all Justices of the Peace and a Justice of the Peace may feel diffident about approaching someone who is a stranger to him.

I might add, at this point, that the duty of the Crown Attorney to "advise justices of the peace with respect to offences against the laws in force in Ontario" is not as clear as it might be. To offer advice when requested by a Justice of the Peace himself is one thing; to offer unsolicited and gratuitous advice may be seen to come perilously close to interfering with the judicial independence of the Justice of the Peace. For this reason, most, if not all, Crown Attorneys would not offer any advice unless the initiative comes from the Justice of the Peace himself. Furthermore, it is not clear if this only refers to legal advice or any sort of advice. If, for example, a private person swears an information before a Justice of the Peace charging an offence in a matter that has already been exhaustively investigated by the police who have concluded that no offence was committed, is it proper for the Crown Attorney to "advise" the Justice of the Peace of this fact? On the one hand, it may be a means of assisting the Justice of the Peace in coming to his decision; on the other hand it may very well be seen as undue pressure and an attempt to interfere with the discretion of the Justice of the Peace. In the absence of a clearer statutory authority, it would seem preferable to conclude that the present provision envisages only legal advice, and, as a practical matter, only when the Justice of the Peace himself requests that advice.

There are two other sources of advice that are less easy to deal with and that really raise fundamental questions and the first is the police, or at any rate senior or experienced police officers, and the other is the local Provincial Court Judge. I shall have more to say about the relationship between the Justice of the Peace and those persons.

It is understandable that a Justice of the Peace, perhaps in a fairly isolated community, perhaps on terms of personal friendship with police officers of one sort or another, should turn to a police officer for advice on some matter that may be worrying him. I must state categorically, however, that the practice is wrong and must cease, not so much because the police have no business giving legal advice to anyone as because the police are investigators and in the vast majority of cases the informants in respect of whose attestation as to a reasonable and probable cause the Justice of the Peace must make a determination. Justice is not done nor can it be seen to be done unless the independence of the Justice of the Peace is maintained by an arm's length relationship with the police. However tempting and easy it might be, police officers are not the proper persons to whom any Justice of the Peace should turn to for advice. Certainly it is grossly improper for any police officer to offer unsolicited advice to a Justice of the Peace.

I do not suppose there is a single Provincial Court Judge who would not provide his assistance and advice if asked, by a Justice of the Peace, though I imagine that some are more ready to do so than others. Whether it is proper for him to do so is a question that has become somewhat complicated since the introduction of the provisions of the Provincial Offences Act and the establishment of the Provincial Offences Court. A Justice of the Peace may sit as a trial judge and in some circumstances, an appeal may be taken from his decision to a Provincial Court Judge. Even in these narrow circumstances, I imagine that cases where only a point of law will be involved will be few and far between, but it does mean that there may be occasions when a Provincial Court Judge may have to decline the request for advice. In most cases, however, advice from a Provincial Court Judge may be sought and given without impropriety. Whether the Provincial Court Judge is the most appropriate person to be providing this service is a different matter. One does not normally consider it to be part of a judge's function to give advice to others: he is there to make his own decisions - a difficult and time consuming task in itself. As an informal method of a Justice of the Peace receiving advice and help, I do not think that in most cases it is improper or undesirable, but as a structured system, I do not think it right to put this formal burden on to Provincial Court Judges.

In the same area, the question has arisen whether, in addition to receiving advice, the Justice of the Peace should also be subject to receiving a direction on legal questions. In other words, having received the advice, is he bound to follow it? It is true that all Justices of the Peace can only act under the direction of the Chief Judge of the Provincial Court

or a Provincial Court Judge, but the interpretation that has been given to that is that this provision applies to jurisdictional and administrative matters and not to directions on legal decisions. That is to say, it enables the Provincial Court Judge to direct a Justice of the Peace as to what to do and when to do it, but not to come to any particular decision.

Justices of the Peace are, of course, bound by statute and by the rules of stare decisis, just as any other judge is. But in that area where there is no binding authority, should a Justice of the Peace be required to follow the direction of someone else on legal questions? I would have thought that a Justice of the Peace would, in practice, do so, but this does not appear invariably to be the case. Little help in this matter can be gained from the English practice since those justices have legally trained clerks to guide them in the law and whose directions they are theoretically supposed to follow. Whether they always do so is a moot point, but in any case, our Justices of the Peace do not have legally trained clerks. If "advice" is to be interpreted as a binding direction, it could only be so when that direction is issued by a Provincial Court Judge, or more senior judicial officer: it cannot be suggested that the advice of a Crown Attorney or police officer should be binding, since that would destroy the judicial aspect of the function of a Justice of the Peace.

The basic question is what is the true interpretation of the provision in the Justices of the Peace Act that a Justice of the Peace may exercise "those powers ... when so directed by the chief judge or by a designated provincial court judge"? I have come to the conclusion that the present interpretation is correct viz. that the direction goes only to the scope of the powers of the Justice of the Peace and not to the issuing of binding directives on questions of substantive law or procedure. Whether there should be some such position will be discussed in my recommendations.

At present, therefore, it appears that there is no authority in any person or body to direct a Justice of the Peace as to legal matters of substance and procedure, beyond his duty to follow statutory rules and binding precedent. The only remedy against what is perceived to be an incorrect decision lies in an appeal or by way of appropriate prerogative proceedings. To this extent, the Justice of the Peace is an independent provincial officer.

(i) Security, discipline and tenure

"Security" may refer to two matters - security of payment and security of employment. Some fee Justices of the

Peace - perhaps the majority - accept their commission in the expectation of receiving on a regular basis some predicated amount in the way of fees, only to find their expectations dashed, or that the actual amount received fluctuates wildly from year to year. Their fee income is, of course, dependent upon the amount of business they have. As I point out above in paragraph (g), dealing with workloads, if there is no business in the jurisdiction to generate fees, then a justice cannot complain if his expectations do not materialize; where there is, however, the business, there has to be some equitable distribution of the workload, so that all fee Justices of the Peace share in the available fees. Their workload cannot, as I have pointed out, be dependent upon the police deciding which Justices of the Peace are "patronized" and which are not.

If no more Justices of the Peace are appointed for any particular location than can comfortably handle the workload, then presumably, all will receive their share of the work, but the difficulties of precisely estimating the need, of the fluctuating nature of the workload itself and of the need of making sure that a justice be available at all reasonably necessary times, make this difficult to accomplish. One solution may be to abolish the fee system in favour of a proportionate salary scheme or adopting a rotation system, directed by some dispassionate person (such as the local Provincial Court Judge or some official), to ensure an equitable distribution. These will be examined in my recommendations.

"Security" may also be viewed in the context of security of appointment, the right not to be fired, or tenure, and this also involves the question of discipline and suspension. The Commission of Justice of the Peace is for life, but this does not mean that it cannot be revoked at any time by Order-in-Council. But, as has been seen, it is the direction to act that confers upon a Justice of the Peace his powers and duties. A Direction is not limited by time, nor does there seem to be any reason why a Direction cannot be varied or revoked at any time. Furthermore, even a Direction does not guarantee work and a Direction is not much use to a Justice of the Peace if no one makes use of his services. In the case of a salaried Justice of the Peace, he may receive his salary but have no work; in the case of a fee Justice of the Peace, he will receive no work and hence no fees. We have, therefore, to distinguish between formal security and discipline and informal security and discipline.

I do not think that there is any room in the legal system for the informal handling of troublesome matters. It may be tempting, given, for example, (and these are only examples) a

Justice of the Peace incapacitated through alcohol addiction, or a Justice of the Peace who simply does not have the intellectual capacity to function properly (leaving aside the fact that he should never have been appointed in the first place), merely not to issue or to revoke a Direction, or even more informally, merely to pass the word around that his services should not be used. It may be said that no harm is done by his being allowed to retain his Commission and that it saves embarrassment to him. This may be true, but the informality, for good motives, on one occasion may, on another occasion be the improper circumvention of formal procedures.

Section 9 of the Justices of the Peace Act (enacted in 1973) provides:

9. (1) There shall be a Justices of the Peace Review Council composed of,

- (a) the chief judge of the provincial courts (criminal division);
- (b) the chief judge of the provincial courts (family division); and
- (c) the senior provincial judge for the county or district concerned in the matter being considered by the Council.

(2) The Attorney General may designate a provincial judge in a county or district to act as a member of the Justices of the Peace Review Council in the absence of the senior provincial judge in the county or district.

(3) The functions of the Justices of the Peace Review Council are,

- (a) to review the conduct of and performance of duties by justices of the peace in the county or district;
- (b) to receive complaints respecting the misbehaviour of or neglect of duty by justices of the peace in the county or district of their inability to perform their duties;
- (c) to take such action to investigate complaints as the Council considers advisable including the review thereof with the justices of the peace where appropriate, and after giving the justice of the peace an opportunity to be heard, to make such recommendations to the Attorney General with respect thereto as it sees fit.

(4) Where an investigation of a complaint is undertaken under clause (c) of subsection (3), the chief judge of the provincial courts (criminal division) or the chief judge of the provincial courts (family division) may suspend the justice of the peace from the performance of his duties until the Attorney General otherwise directs.

(5) The proceedings of the Justices of the Peace Review Council shall not be public, but it may inform and advise the Attorney General respecting matters that it has investigated or reviewed.

(6) For the purposes of an investigation under this section, the Justices of the Peace Review Council has the powers of a commission under Part II of The Public Inquiries Act, 1971, which Part applies to the investigation as if it were an inquiry under that Act.

(7) No action or other proceeding for damages shall be instituted against the Justices of the Peace Review Council or any member or officer thereof or any person acting under its authority for any act done in good faith in the execution or intended execution of its or his duty.

It is thus made explicit that it is the function of the Justice of the Peace Review Council to review the conduct of and performance of duties by Justices of the Peace. Implicit in that is that it is no one else's function. It is the Council that is to receive complaints respecting misbehaviour of or neglect of duty by Justices of the Peace. It is the Council that is to investigate and advise the Attorney General and, implicit in this, is that it is the Attorney General who shall then decide what action, if any, to take.

It appears to me that, cumbersome and formal as this procedure might be, the only proper construction to be put upon it is that it is envisaged that a Justice of the Peace shall enjoy security in holding his Commission and shall not be subject to 'demotion' from a Direction A, to, for example, a Direction B, and shall not have his Direction revoked, save in accordance with its provisions and for the causes set out. Equally implicit is that those provisions shall not be circumvented by withholding business from a Justice of the Peace holding a Direction. One would expect that in many cases, a Justice of the Peace, conscious of misbehaviour or neglect of duty, would voluntarily resign his office, but in all cases

where he disputes the allegation or the seriousness of it, he is, and should be entitled to the protection envisaged by the Justices of the Peace Review Council.

Equally implicit in the establishment of the Council is, in my view, the proposition that the commission of a Justice of the Peace shall not be arbitrarily revoked, though this is nowhere stated. Thus while the Act provides a procedure, in fact there is nothing to compel anyone to follow this procedure. I am left with the uneasy feeling that while Section 9 pays lip-service to something along the lines of a Judicial Council, it falls far short of providing any real safeguards. If, as I hope to show later, one objective should be the raising of the level of Justices of the Peace in terms of education, awareness of their functions, and prestige, this has to be remedied. Security, to be meaningful, must embrace not only proper procedures to prevent the arbitrary revocation of the Commission of a Justice of the Peace, but also safeguards against arbitrary administrative manoeuvres that may have precisely the same effect.

Finally, I also note that there now exists a power, under Ss. 9(4) to suspend a Justice of the Peace from his duties pending an investigation of a complaint by the Justices of the Peace Review Council. This, in itself is not objectionable but by Order-in-Council of February 20, 1980, the Deputy Attorney General may withhold the salary of a Justice of the Peace during the period of suspension. The power to withhold salary for what might be a protracted length of time is a powerful weapon and, in my view, quite inappropriate in dealing with any judicial officer. Continuing the salary of a suspended Justice of the Peace, even if he is subsequently dismissed for cause after a proper hearing, is a small price to pay for maintaining the prestige and dignity of the office in respect of all the other Justices of the Peace.

(1) Facilities

As may be expected in a province as large and diverse as Ontario, generalizations about facilities can be awkward if not misleading but one has to try to get some sort of picture, though I think it is desirable to distinguish between the situation in the larger urban centres and that in the smaller communities.

(i) Physical space

There is no doubt in my mind that while in the larger centres a conscientious effort has been made to provide adequate

facilities for Justices of the Peace, in no case are they more than adequate and in most cases they remain less than adequate. The reason is that no one has objectively decided precisely what the needs of the Justices of the Peace are.

In the first place, whatever is provided, the one location where a Justice of the Peace should not have office facilities is in a police station. Yet far too many (as far as I can estimate as a result of my surveys and questionnaires some 40 to 50) Justices of the Peace in other than major urban centres still have facilities in police stations. It is hardly worth belabouring such an obvious point save to say that this is highly improper. Many fee Justices of the Peace work out of their homes and have no other facilities. Those that are in this category seem to find the arrangement satisfactory and it is convenient for them and preserves their independence. Nevertheless, one aspect of the function of the Justice of the Peace is that he must be available to members of the public and a private home is not conducive to public availability. While I cannot strenuously criticize the practice of the Justice's of the Peace office being in his home (indeed, in the more rural areas it may be the only practical solution), it is not the most desirable arrangement and wherever possible should be avoided.

The facilities for Justices of the Peace should, of course, be located in the courthouse where they belong and this is the practice in this province wherever it is possible. If it is not possible, then some location such as the town hall or town centre should be made available - any place not connected with the police force to which the public not only has access but to which it also feels it has ready access.

The Justices of the Peace office must be private. This is not to say that each Justice of the Peace in the province must be provided with his own private office - that, however pleasant, would be unnecessary. But it does mean that each Justice of the Peace when on duty has to have available a room where informations and reports can be studied and kept privately and where persons (complaints and others) can be interviewed in private. He needs a place to don his gown (if he is a sitting Justice of the Peace) as well as a place to keep personal effects.

The office must be situated in such a way that the public has access to it, yet the unfortunate fact is that some measures for the personal safety of the Justice of the Peace may have to be taken. One cannot ignore, however much one may wish that this were not so, the fact that disappointed or aggrieved complainants, witnesses, or sureties may (and on occasion have)

threatened the personal safety of the Justice of the Peace. I do not think the situation is particularly serious, but the obvious method of preventing it becoming serious is to take steps to minimize the risk. Such steps will obviously vary from place to place and an examination of each facility should reveal the most appropriate measures which may range from the availability of security personnel, the provision of alternative means of egress, down to the provision of some sort of alarm system. In many of the smaller localities, perhaps the risk is so slight that no steps need to be taken.

Whether, in addition to such office space, library and common room facilities should also be provided depends very much on the locality and the conditions. Obviously, if one or two Justices of the Peace only are present, the provision of common room facilities is pointless. On the other hand, if one is dealing with a centre where ten or twenty Justices of the Peace are present at any one time, a common meeting-place is desirable, less for purely social reasons than because talking over problems and discussing difficulties are the best ways of arriving at solutions and deriving mutually beneficial education and training. In this context, a common room is not a luxury and while not perhaps necessary is at least desirable.

In the same way, if all Justices of the Peace are provided with the basic materials necessary for their duties - I shall discuss this in more detail later on - such as a copy of the Criminal Code, of the Provincial Offenders Act, Highway Traffic Act and so on - the question arises whether some more sophisticated library facilities should be available to Justices of the Peace. I do not think there is much point in arguing that Justices of the Peace are not concerned with legal problems - their main function, even when sitting, being to decide on the facts. As far as sitting Justices of the Peace are concerned, as I have mentioned previously, there will be occasions (and with the provisions of the P. O. A. now in effect those occasions may likely increase) when they are called upon to decide legal questions. Again as I have previously discussed, there must be some way in which they can seek and obtain independent advice when this happens, but it is not asking too much to state that some modest library facilities should also be available which they can consult. In any case, a large number of them are interested in self-improvement and do make an effort to read relevant decisions and tests and this should be encouraged rather than discouraged.

It is neither necessary nor possible to provide library facilities for all Justices of the Peace in the province, but in the larger urban locations it seems to me that

Justices of the Peace should either have access to the libraries now provided for the Provincial Court Judges or, if this is not seen as desirable, have their own modest library facilities. I say "modest" because there is no need for anything approaching a "law library", but there should be available, at a minimum, the current Ontario Statutes, relevant federal statutes, and a collection of reports, journals and texts that are likely to be of use to them.

No locality in the province now provides these facilities. Even trifling matters can reach annoying proportions. In the Old City Hall in Toronto, Justices of the Peace have to use the public washroom facilities - a matter that might be viewed as of no consequence until one realizes the awkwardness (not to say danger) in a Justice of the Peace being accosted there by a person whom he has just found guilty and fined. This lack of planning and failure to realize the legitimate needs in providing for facilities for Justices of the Peace can so easily be remedied at little cost.

(ii) Secretarial Services

On the whole, secretarial services seem to adequate, though there seems to be a fair number of fee Justices of the Peace in the province who still have to type up informations and do much of their own secretarial work. It is, in my view, no part of a Justice's of the Peace function to type informations on a regular basis - his function is to receive the information which assumes that it is already in a form in which it can be received. At the same time, there may be occasions when a private complainant is not sure of the proper procedures or the proper form and in such cases Justices of the Peace should properly assist the complainant in completing the information even to the extent of typing it for him if no other help is available.

A NOTE ON EX-OFFICIO JUSTICES OF THE PEACE

Every judge of the Supreme Court of Canada, the Federal Court of Canada, the Supreme Court of Ontario and the county or district courts are ex officio Justices of the Peace (s. 1 Justices of the Peace Act). Superior court judges have been ex officio Justices of the Peace since 1878 (An Act Respecting the Magistracy, S.O. 1878, ch. 4, s. 1) and in 1909 county and district court judges acquired this status (amendment S.O. 1909 ch. 26). Provincial Court Judges are Justices of the Peace by virtue of Section 9 of the Provincial Courts Act of 1968.

The Commissioner of the Ontario Provincial Police, having the status and powers of a Provincial Court Judge (s. 43(1) Police Act) is also therefore a Justice of the Peace. A returning officer and deputy returning officer at municipal elections have all the powers of a Justice of the Peace (s. 68(1) Municipal Act) though in provincial elections such officials are accorded affidavit and oath-taking powers directly without being accorded Justice of the Peace status.

By s. 17(1) of the Royal Canadian Mounted Police Act, the Commissioner and every Deputy Commissioner, Assistant Commissioner and Chief Superintendent of the Royal Canadian Mounted Police are ex officio Justices of the Peace while every Royal Canadian Mounted Police Superintendent and every officer may be designated ex officio Justices of the Peace by the Governor in Council (Sec. 17(2) Royal Canadian Mounted Police Act).

R. v. LaFontaine (1973), 13 C.C.C. (2d) 316 (Zuber J.) is one of the very few cases that even discuss the position of ex officio Justices of the Peace. The case involved an application for bail for an accused charged with manslaughter (an offence bailable by a Justice of the Peace) before a Superior Court Judge. It was argued that the Superior Court Judge, being an ex officio Justice of the Peace had the jurisdiction to release the accused on bail. Zuber, J. held that, if he did have such jurisdiction (a point left open), an ex officio Justice of the Peace should only act in cases of emergency or necessity and pointed out the rather anomalous situation that would result if a Superior Court Judge's disposition (in his capacity as a Justice of the Peace) fell to be reviewed under s. 457.5 by a County Court Judge (in his capacity as a "judge" under s. 448).

Ex officio Justices of the Peace are not given directions by the Chief Judge of the Provincial Court and I suppose it can be argued that ex officio Justices of the Peace (even Superior Court Judges) having no direction, have no power to act by virtue of S. 6 of the Justices of the Peace Act, and that being an ex officio Justice of the Peace means only that they are peace officers and may take affidavits and administer oaths.

I am not at all sure either where the power of the federal government to appoint Justices of the Peace in general comes from. Under the Indian Act, there is a power to appoint Justices of the Peace, presumably valid within s. 91.24 of the British North America Act, for the purpose of jurisdiction over Indians. Presumably, also by virtue of its legislative authority over the Territories, it has power to appoint Justices of the Peace for those areas. But it seems beyond question that the provinces have exclusive jurisdiction to appoint Justices of the Peace in general under s. 92.14 of the British North America Act.

I suspect it is rather beyond the scope of my terms of reference to inquire into the practice of the function and status of ex officio Justices of the Peace, but this brief note seems to me to indicate either that they are anachronistic and unnecessary or, if they are to be retained, that much more thought should be given as to who should be so appointed and why.

III. THE PROBLEMS

1. The Role of the Justice of the Peace

It gives me great concern that the duties and functions of the Justice of the Peace are not always clearly understood by those involved in the criminal justice system - by the public, the police, Crown Attorneys, and even judges, to say nothing of government officials. Indeed, I am not at all sure that all Justices of the Peace fully understand their own duties and functions. To a large extent this situation has developed, or been allowed to develop, because of the failure to commit enough financial resources to the office of Justice of the Peace. It has been easy, over the past 100 years or so to downplay the role of the Justice of the Peace while at the same time burdening him with more and more responsibilities. It takes money to train and educate Justices of the Peace; it takes money to provide them with reasonable remuneration and reasonable facilities.

Justices of the Peace, taking them as a group regardless of their direction, perform a large number of functions and without them, the system as we know it would collapse. They try cases, subject to their jurisdiction, where there is not a guilty plea; they bear the brunt of the disposing of the guilty pleas or guilty with an explanation pleas; they may adjourn cases in the absence of the judge; they often deal with the large numbers of failures to appear; they handle a great deal of the bail applications and the accompanying administrative problems; they are in constant demand for swearing affidavits for various purposes essential to the administration of criminal justice; they must consider search warrant applications and decide whether to issue search warrants; they must receive criminal process informations, and decide whether to issue process; they must confirm or cancel appearance notices or promises to appear; they spend much of their time on parking and highway traffic violations; they provide over-the-counter advice for private informants.

I considered, but quickly rejected, the possibility of fundamentally restructuring the whole system by abolishing the office of Justice of the Peace. The functions now performed by the Justice of the Peace can be broadly categorized as the adjudicative (including trials, sentencing and so on), the bail

processing and the criminal process-issuing (in the wide sense of issuing process, search warrants, signing affidavits, etc.). A new level of provincial judiciary could be created to take care of the first function; bail determination could be handled by a new category of official; and the criminal process-issuing left to the police or executive officials. Quite apart from the fact that I do not see what would be gained in terms of efficiency or economy, a more basic objection is that the Justice of the Peace is the very person who stands between the individual and the arbitrary exercise of power by the state or its officials. It is essential that an independent person be the one to determine whether process should issue, whether a search warrant should be granted, whether and on what terms an accused should be released on bail and so on. This is a fundamental principle at the heart of the common law and in my opinion must be zealously preserved.

Thus I start with the proposition that the office and function of the Justice of the Peace must be retained, and turn to the general areas of concern that have been expressed to me.

1. Is the Function of the Justice of the Peace Properly Understood?

The Justice of the Peace operates at three levels of function - adjudication, bail and process. On the first level he is, in every sense of the word, a judge. He convicts or acquits, he imposes sentence, and does all those things ancillary to the trial process. In many ways, this is the easiest of his functions to understand. While it is true that he only has limited jurisdiction and he is on the lowest tier of the judicial hierarchy, I do not suppose anyone would have difficulty in appreciating this aspect of his duties.

The decision to release a person accused of an offence on interim release, and if so, upon what terms and conditions, or, what perhaps is in practice more important, the decision to retain an accused person in custody, while not an adjudicative function, is, nevertheless a judicial function. It is not a determination of guilt or innocence but it involves the freedom of the individual and the determination must be made judicially. I have heard of occasions on which others such as the crown or the police (the "prosecutor") have attempted to usurp this function and have attempted to pressure the Justice of the Peace into granting or denying bail or into imposing conditions that they find acceptable. I cannot imagine that this is a common practice but common or not, if it exists it is totally reprehensible. Of course, the "prosecutor" has a function and must present his views, but the decision must be that of the justice

acting judicially.* I assume that this is perfectly clear to those involved in the administration of criminal justice, but if it is not, then the sooner it is made clear the better.

I have concluded that most confusion exists over the process function of the Justice of the Peace. If he is merely a rubber stamp, exercising no discretionary power then he is both unnecessary and insignificant. Unfortunately, there is enough evidence to support the conclusion that this is the view of some police officers who should know better. Arbitrary search, arbitrary arrest and ultimately arbitrary prosecution can only be prevented if there is someone to ensure that the search, arrest and prosecution is not arbitrary. Unless a prior authorization is given, a person is not liable to be searched or have his premises searched, or be arrested or be prosecuted.

It is true, of course, that in a number of instances, in cases of emergency or perceived danger or in the case of minor infractions, prior authorization is not required though pre-existing justification is required. A police officer may, on many occasions arrest without warrant, or in a few cases search without a warrant: the certificate of offence procedure launches a prosecution without prior authorization. But these exceptions cannot alter the fundamental premise of the common law that, in general, an independent judicial officer must be satisfied that there is justification before any of these steps may be taken. That person is the Justice of the Peace and he is neither unnecessary nor insignificant.

If there is one constant criticism that I have heard it is that many (but by no means all) police officers do not appreciate this aspect of the function of the Justice of the Peace. As an example of the problems, let me compare various statutory provisions that bear upon the process function of the Justice of the Peace.

Section 455.3 of the Code states:

- (1) A justice who receives an information ... shall
 - (a) hear and consider, ex parte,
 - (i) the allegations of the informant, and
 - (ii) the evidence of witnesses where he considers it desirable or necessary to do so.

Section 443, however, which deals with the issuing of search warrants merely states:

- (1) A justice who is satisfied by information upon oath ... may at any time issue a warrant.

Under the Provincial Offences Act, where the information procedure is used, a justice "shall consider the information and, where he considers it desirable to do so, hear and consider ex parte the allegations of the informant and the evidence of witnesses".

The difference in wording is striking. Where a Criminal Code offence information is laid, the justice must hear the informant and may hear other witnesses; for a search warrant information, he must proceed on the contents of the sworn information itself; for a Provincial Offences Information, he may hear the informant or other witnesses. A justice who issues process under a Criminal Code information without hearing the informant is simply not performing the duty imposed upon him; to issue a search warrant without considering the contents of the sworn information is similarly a breach of duty; under a Provincial Offences information he shall consider the contents of the information and may hear witnesses.

There is no doubt in my mind that in many jurisdictions sloppy police practices have grown up which are condoned by some justices. No Criminal Code information should be processed in the absence of the informant since the justice must hear the informant and even if this consists in no more than the justice saying "Tell me something about the facts of this case", it is his duty to do so. This may not be very convenient for the police, but expediency cannot make what is unlawful lawful.

It is only if all justices and all police officers understand the nature of this duty that the system can work as it should. Criminal Code informations should not be dumped on a Justice's of the Peace desk in the expectation that they will be routinely processed; the informant must be on hand and must expect to be questioned about the facts. For his part, the Justice of the Peace has a duty to consider each information judicially and issue process only after being satisfied that a case has been made out. I cannot stress enough that failure to do so strikes at the very basis of the common-law criminal process and that a Justice of the Peace who fails in this duty is simply not worthy of being a Justice of the Peace.

I also observe a distressing and to my mind completely insupportable trend, evidenced both by the present fee structure and by some Justices' of the Peace own perception of themselves, to elevate the stature of the so-called "sitting Justice of the Peace" above that of the so-called "signing Justice of the

Peace". It is this very attitude that is responsible for the unjustifiable discounting of the importance of the Justice of the Peace in his criminal process function. All functions of a Justice of the Peace are important whether it is that of adjudication, or bail application or the issuing of process. A Justice of the Peace who receives and considers informations is entitled to precisely the same respect and decent facilities as a Justice of the Peace who sits as a Provincial Offences Court Judge. His function, as such, is a different, but no less an integral part of the criminal process system.

It is true, of course, that different people are better suited to and qualified for different functions, and that different levels of remuneration may be appropriate. It is also true that what may be required for the proper training of a Justice of the Peace who sits as a judge is not necessarily required for a Justice of the Peace who only considers informations, but Justices of the Peace themselves must realize that this difference is only one of function not one of prestige or importance. There simply are not and cannot be allowed to be first-class and second-class Justices of the Peace. If they are not all first-class, they might as well not exist. But that means, of course, first-class in relation to the functions each of them performs. This does not lead to the conclusion that there are different levels of Justices of the Peace, only to the conclusion that there are different functions on levels of equal importance and prestige.

This leads me into some general observations on the method and level of remuneration for Justices of the Peace. The present system is chaotic. The salaries of full-time sitting Justices of the Peace range from \$21,425 to \$25,825 per annum, although they may receive an added monthly allowance of up to \$375.00 when designated a "Night Bail Justice of the Peace". Full-time, non-sitting Justices of the Peace may receive a salary anywhere between \$19,100 to \$22,625. Fees and expenses for fee Justices of the Peace are set out in the Regulations and range from 50 cents for receiving a parking by-law violation, \$1 for other informations, \$2 for search warrants, \$10 an hour for attending to remand prisoners between 8 a.m. and midnight and \$20 an hour between midnight and 8 a.m., up to \$45 an hour when presiding over a Provincial Offences Court. In addition, a civil service Justice of the Peace, who is in receipt of his civil service salary, is entitled to extra fees for Justice of the Peace duties performed outside his normal working hours.

There is some dissatisfaction with the level of remuneration for full-time Justices of the Peace. It is said that often they are making less than the police officers who

attend before them though I do not find this a very persuasive argument. Superior court judges make considerably less money than many of the counsel who appear before them. It is also said that a full-time salaried Justice of the Peace should receive a salary somehow geared to that of a Provincial Court Judge inasmuch as such a Justice of the Peace performs many of the functions performed by a Provincial Court Judge, particularly since the introduction of the Provincial Offences Act. It is suggested that the salary of such a Justice of the Peace should be four-fifths or three-quarters that of a Provincial Court Judge.

This argument, it seems to me, does not take adequate account of the differences in training and expertise or in the responsibilities of the two. The Provincial Court Judge has, under our system, incredibly wide jurisdiction and responsibilities - indeed, he is at the very back-bone of the criminal justice system. He is essentially a trial judge; he is legally trained and is expected to maintain his expertise. In contrast, the Justice of the Peace has no legal background; his educational level may be minimal.

Nevertheless, if one could be assured that the Justice of the Peace had received an acceptable level of education, and was in receipt of adequate training and did exercise his duties and functions properly and did attend to those duties on a full-time basis, I do agree that his salary should be at a level that adequately reflects his importance and prestige, and that the present salary structure is inadequate for these purposes.

As far as the fee system is concerned, I can only state that the sooner it is abolished the better. It is quite inappropriate that anyone holding any type of decision-making office should be compensated on a piece-work fee basis. It encourages a desire to promote volume of work at the expense of quality of work and it penalizes any Justice of the Peace who, in his discretion, wishes to examine more closely the matters with which he is dealing. I should have thought that it is axiomatic that to discourage a Justice of the Peace from performing his functions carefully and properly cannot be tolerated. A Justice of the Peace who spends an hour considering a difficult information should not be paid less than a Justice of the Peace who spends the same hour dealing routinely with 10 informations. In the case of non-salary Justices of the Peace a method must be found for compensating them which is geared to their function, not to piece-work.

Civil service Justices of the Peace are in yet another category, that presents somewhat different problems. I

understand that there is some administrative convenience in having court officials hold a commission as a Justice of the Peace. There is much paper work involved in the criminal justice system particularly in areas such as taking affidavits or issuing subpoenas and it is useful to have a person available for these purposes. One worry is that there are occasions when these Justice of the Peace functions assume such proportions that they impinge upon his civil service functions. If this becomes the case, then it should be clear that the solution to the problem must be the use of extra manpower. I do not think that it is either fair or proper to expect one person to do the work of two. Furthermore, in some localities "administrative Justices of the Peace" are seen to be and may actually be in competition with fee Justices of the Peace. In an area where a fee Justice of the Peace is dependent upon the volume of business for his income (or some part of it), the appointment of an administrative Justice of the Peace, may mean that his services will be used at the expense of the fee Justice of the Peace. This may be cost-efficient but I doubt if it preserves the appearance of independence of Justices of the Peace.

The appointment of a civil servant as a Justice of the Peace, increases his salary qua civil servant by moving him up one step in the civil service salary scale. Since many of them have A or B Directions, it is also possible that they may earn extra fees by performing duties outside normal working hours - for example, by sitting as a judge in Night Traffic Court. His appointment may therefore be viewed by the Justice of the Peace himself and as others as a reward, or as a means of increasing his salary. As a corollary of this, some civil service Justices of the Peace are annoyed or disappointed when they are denied the opportunity to earn extra income by not being assigned to sit outside normal working hours.

I do not, however, think it is proper to use the Justice of the Peace Commission as a means of reward; nor should a civil servant accept it in the expectation that it is a method of increasing his salary, beyond the one step increase in his civil service pay. At the same time, I accept that there may be occasions when a civil service Justice of the Peace may be asked to fill in in the case of an absent sitting Justice of the Peace or an unusually heavy docket. But these should be the exception rather than the rule. If it appears that there is need for a Justice of the Peace to sit on a regular basis then, again, the proper procedure would be to increase the manpower rather than distribute patronage among civil servants.

One small, but important point also concerns me about civil servant Justices of the Peace. The Justice of the Peace

Commission is potentially for life and civil servants appear to retain their commissions after they have left the service when the reason for their appointments have long since disappeared. I shall have more to say about security and tenure when I deal with specific problems but I see no reason why civil service Justice of the Peace Commissions could not terminate upon the termination of a civil service appointment.

There is one final general observation I wish to make and it concerns the whole question of the independence of Justices of the Peace, control and direction. Much confusion has arisen, not least in the minds of Justices of the Peace themselves, over this matter that it will be as well to try to sort out, and it really only confuses matters more to try to distinguish between the so-called judicial functions and administrative functions of the Justice of the Peace. Whenever any Justice of the Peace, or, for that matter, any official, judicial or not, is under a duty to act, he may be directed to perform that duty. Clearly he is under a duty to receive informations, to swear affidavits; no less, he is under a duty to perform his office, to sit (in the case of a sitting Justice of the Peace) where and when he is directed to. This does not interfere with his judicial independence any more than the Chief Justice directing when and where High Court judges shall go on assizes or the Chief Judge directing which Provincial Court Judges shall sit in which court interferes with their judicial discretion. It is perfectly proper, indeed absolutely necessary, that someone have the authority to direct Justices of the Peace, in this sense. Who should have that authority is rather a different question, but there has to be a system that ensures that a justice is sitting in Provincial Offences Court when it is scheduled to be in session, or holding show-cause hearings when they are scheduled, or is available to receive informations and so on, if not at all times for 24 hours a day, at least at times when a Justice of the Peace would normally be available.

This is part of the administration of the criminal justice system to which no one can reasonably object. Nominally, the authority to direct is in the hands of the local Provincial Court Judge or the Chief Judge and if matters come to a dispute it would be his duty to settle the dispute, issue the directive and ensure that his directives are carried out. In practice in many cases a "senior" Justice of the Peace may assume the responsibility of ensuring that Justices of the Peace are where they are supposed to be. In all the larger centres, of course, the court administrator, who may himself also be a Justice of the Peace, will have the task of ensuring the smooth running of the system. But, however it is done in practice, it is the Chief Judge or the local Provincial Court Judge who bears

the responsibility. I shall examine later the question of whether he is the most appropriate person to have this responsibility.

Once he is performing his duty, however, the next question is whether the Justice of the Peace is subject to direction and control as to how he performs that duty. On questions of law, he is, of course, subject to statute and stare decisis, as are all other judges. Being an inferior court, he is subject to the control of a superior court. In the sense that an appeal may be taken from his decisions or, in appropriate cases, a remedy by way of prerogative writ may lie, he, like other inferior courts, may be directed and controlled. Again, no reasonable person could maintain that this interfered with his judicial independence, nor that failure to act in accordance with established law is other than a breach of duty.

The realities of the office of Justice of the Peace, however, are such that an appeal or extraordinary remedy is often neither expedient nor practicable in cases where there is no established law on a particular matter. For example, to cite a problem that has arisen, some justices of the peace are of the opinion, mistakenly in my opinion, that the process of scrutinizing sureties to determine whether they are acceptable, is one that should be carried out "in public" - that is, in a place to which the public has access. Such a justice is directed by the appropriate authority to attend at a prison or police station for the purpose of scrutinizing sureties, but when he arrives refuses to proceed because such places are not "public". Whether he is right or wrong depends upon whether such a process must be held in public - a question of law that has not been determined judicially. To settle the matter within the judicial system, mandamus would have to be brought against the Justice of the Peace - a perfectly proper solution. It is, however, simpler, more efficient, and above all, fairer to the accused who may meanwhile be denied bail, to send another Justice of the Peace who does not hold the same view as his colleague and not assign the latter to those duties. Thus, as a matter of practice, this sort of legal question may never get resolved except by skirting the issue by administrative means.

It has been suggested that the Chief Judge or local Provincial Court Judge has the power not only to direct the Justice of the Peace what to do, where and when but also to direct him as to what decision in law to reach. I cannot accept this proposition. It is one thing to direct a Justice of the Peace on administrative matters: it is quite another to direct him on his judicial function by extra-judicial means. Judicial independence necessarily means independence in the fact-finding

process (within the limits imposed by the law of evidence and procedure) and independence in the application of the law (within the limits imposed by statute and judicial precedent). Extra-judicial methods to control the judicial process cannot be tolerated.

Nevertheless, it seems to me highly desirable that there be a simple and effective way to settle matters upon which there may be dispute or unsettled problems where an appeal or prerogative remedy is either impracticable or difficult, but this way must exist within the judicial system, not extra-judicially. In England, it has long been the custom for the superior courts (i.e., the Court of Appeal or High Court) to issue what are called Practice Directions regarding either the practice to be followed in the future in their own courts or, as part of their supervisory role over inferior courts, what is to be done in certain practice and procedural matters in lower courts. These practice directions represent only the views of the judges concerned and do not have the authority of a statute or Rule. Indeed, they are used to clear up doubts and ambiguities or to fill gaps in the statutory provisions of the Rules.

Given the close connection between the provincial court judiciary and the Justices of the Peace particularly since the implementation of the Provincial Offences Act, it seems to me that it would be useful and expeditious if the Provincial Court were given the power to issue Practice Directions to Justices of the Peace concerning matters of practice and procedure that affect the powers and duties of Justices of the Peace and on which there is ambiguity or doubt. This should not be done administratively but judicially and since the Provincial Court is not a superior court the power would have to be given by statute. I would suggest the establishment of a Divisional Court of the Provincial Court (composed perhaps of the Chief Judges or, in either's absence, the Associate Chief Judge) and one other Provincial Court Judge nominated by the Chief Judge (Criminal Division) who, sitting en banc, would issue the necessary direction, doubtless in practice after consultation with their brethren. Such a direction would be binding on the Justices of the Peace, and, unless and until overturned by a superior court, would represent the law in Ontario. Unfortunately, I do see some constitutional problem inasmuch as while I have no doubt as to the power of the province to grant such a power to the Provincial Court in respect of provincial matters, there is no provision in the Criminal Code respecting such a power in respect of federal criminal matters. But if what I suggest is viewed as a matter concerning the constitution of the courts (which, in my view, is the case) rather than as a matter

of criminal law and procedure, perhaps there is no insurmountable constitutional difficulty.

2. Salaries and Remuneration

(a) Full-time Justices of the Peace

Full-time Justices of the Peace are either sitting or non-sitting. The present salary scales are as follows:

	1st Year	2nd Year	3rd Year	4th Year	5th Year & Subsequent
Non-sitting:	19,100	19,900	20,700	21,500	22,625
Sitting:	21,425	22,300	23,425	24,606	25,825

No full-time Justice of the Peace may be appointed a sitting Justice of the Peace with less than 3 years experience as a non-sitting Justice of the Peace. The usual course of promotion is for a full-time Justice of the Peace to be appointed at \$19,100 per annum, to rise to \$19,900 in his second year, \$20,700 in his third year, and then to switch to the bottom of the salary scale of a sitting Justice of the Peace at \$21,425, rising after 5 years to a maximum of \$25,825. In the normal case, therefore, in 8 years a full-time Justice of the Peace will progress from the bottom scale of a non-sitting Justice of the Peace to the top scale of a sitting Justice of the Peace, where he will remain.

These salary scales are based on a full-time working day of 8 hours during normal working hours, with lunch break. Extra income may be earned (up to \$375 a month) for Justices of the Peace taking on additional duties as Night Bail Justice of the Peace, which on an average requires two evenings a week of 2 to 3 hours each.

If my recommendations regarding minimal educational requirements, initial qualifications and necessary initial training are accepted, one must try to consider objectively what would be an appropriate level of starting salary for a person with a minimum education of Grade XII, who has been determined to have the necessary intellectual and emotional capacity to assume the office of Justice of the Peace and who has undergone a period of training in the duties and functions of a Justice of the Peace. I suspect that in practice, intellectual and emotional capacity is also necessarily going to include some reasonable maturity so that it is unlikely that anyone under about 30 years of age or so would receive a commission.

However, it is the scale itself, its compressed nature and the upper limit that most concern me. If, again, my other recommendations are accepted, one would be referring to a person with fifteen or so years (or even more) of experience, who has attended a number of training and educational seminars, who has performed well and diligently in the course of his career and has developed an understanding of the law, and its processes and who is an experienced fact-finder. At this end, I am bound to state that I consider something under \$26,000 grossly inadequate. Nor do I think it at all proper that such a Justice of the Peace, say in his mid-fifties, should have to assume the duties of a Night Bail Justice of the Peace, away from his family for 2 nights a week in order to increase his salary to a decent level. In the next Chapter I shall set out my specific recommendations regarding the salary level of the Justices of the Peace.

But should the increments be automatic? Some sort of merit increase does have the advantage that capable and diligent Justices of the Peace can be advanced while those that are not diligent or simply not capable would not be rewarded. Any promotion system really depends upon recognizing merit. But when one is dealing with judicial officers, merit increases are fraught with danger. Who decides who has merit? If it is the administration in some form, "merit" may easily be perceived to be (and may actually be) only "cooperation"; it may defeat the very essence of judicial independence. If it is a judicial officer of some sort, similar dangers arise.

As I shall explain more fully in my specific recommendations, set out in the next chapter, withholding a salary increase may, in rare cases, be justified, but, if so, only for cause and only after due process. Merit increases are not, I think, really appropriate for judicial officers, but automatic yearly increases are. In other words, the increase should be automatic - not subject to administrative approval or the approval of one's superior - unless a reason is made out why it should not be granted.

We must find a salary scale that would be adequate and reasonable, for what are now called "full-time sitting Justices of the Peace". But there is also the category of full-time nonsitting Justices of the Peace. As I have said, Justices of the Peace are Justices of the Peace and are of equal importance and prestige. Nevertheless, the functions and qualifications of a justice who adjudicates are different from those of one who has no adjudicative functions. His training and expertise is different and his place in the criminal justice system is different. It seems to me, therefore, to be perfectly

acceptable to differentiate in the way of salary between the full-time sitting Justice of the Peace and the non-sitting Justice of the Peace. Nevertheless, I do not think the differentiation should be so great as to demean the importance of the non-sitting Justice of the Peace. As I shall explain, I think that a difference throughout the scale is appropriate.

Of course, I assume that in appropriate cases a Justice of the Peace may be appointed at above the minimum level and that a non-sitting Justice of the Peace would be moved into the category of sitting Justice of the Peace where appropriate. As will appear later, while I recommend this scheme, or one like it, I shall be making further recommendations as to the nomenclature and classification.

So much has already been written about the defects in the present fee system that I am not sure the criticisms need to be repeated. They have tended to concentrate on the fact that it leads to pressure being put on Justices of the Peace to "co-operate" with the police or lose the fees which result from the "business" that is largely supplied by the police. I prefer to state categorically that it is quite improper in this day and age for any judicial officer to be compensated on a piece-work basis however acceptable it might have been in the Middle Ages. His income is insecure and totally unpredictable; it fluctuates from year to year and even week to week; it is entirely destructive of his prestige and standing in the community.

But the simple practicality of the matter is that outside the larger urban centres, it is not considered to be economically feasible or necessary for there always to be full-time Justices of the Peace, though it seems to me that a simple analysis of workloads would make it possible to appoint more full-time salaried Justices of the Peace in many more areas than at present. As a general proposition, I would state that if circumstances warrant it and the workload is sufficient, salaried full-time Justices of the Peace should always be appointed in preference to part-time Justices of the Peace.

It would, even so, however, still remain the case that not all Justices of the Peace could be full-time and on salary, and the question arises that if the piece-work fee system is unacceptable, with what should it be replaced? This depends upon a number of factors that have to be considered, viz.:

(a) Ensuring the availability of a Justice of the Peace. While it is not necessary that a Justice of the Peace be constantly available 24 hours a day, seven days a week, in all localities, the necessity for the intervention of a Justice of

Peace in the criminal process system does mean that one has to be available at all reasonable times: on this point, by way of a comment, I should like to say that I am not convinced by any argument that a Justice of the Peace should be available in all places, seven days a week, twenty-four hours a day. There are two factors to be considered and they are the availability of a Justice of the Peace in the interests of accused persons and his availability in the interests of the investigation and prosecutorial processes. As far as the former are concerned, I do not believe that an accused is or should be entitled to instant release or instant trial, but I do think that he is entitled, other things being equal to release within a reasonable time, or trial within a reasonable time. As far as the latter are concerned, convenience is one thing, but necessity quite another. I suppose there may arise cases of urgency where the police need immediate access to a Justice of the Peace to secure a search warrant or arrest warrant but I cannot imagine that such cases arise with the frequency that we seem to assure. Nor do I really believe that it is asking too much to expect the police to go to the Justice of the Peace rather than have the Justice of the Peace either come to them or be present in a location convenient for them.

(b) As a corollary of this, a Justice of the Peace who accepts a Commission must do so on the understanding that he undertakes the commitments set out in the terms of his appointment to be available at the times and places specified;

(c) The honour and prestige that goes with being a Justice of the Peace must be restored if some of the past abuses are to be rectified and this means that both the scale and the method of remuneration must reflect this;

(d) The scale and method of remuneration must be such that it will attract able and qualified persons and, equally as important, provide an incentive to undertake the necessary training and education programmes;

(e) The scale of remuneration must reasonably compensate the Justice of the Peace for the time he spends upon Justice of the Peace duties, regardless of what form those duties take;

(f) Failure by the Justice of the Peace to abide by the terms of his appointment, such as being absent without leave, should amount to a breach of his duty; and

(g) The scale and method of remuneration must be economically acceptable. That is to say, it must be as cost-efficient as possible given the other factors that must be considered.

I am not sure that it is necessary to work out the details of my proposals - indeed, given the amount of statistical analysis that would be necessary, I am not competent to do

so, but I can propose a scheme to replace the existing fee structure, which I will elaborate in the next Chapter dealing with specific recommendations. Basically, it seems to me that all Justices of the Peace, should receive an annual salary geared to the proportion of his time he is expected to devote to Justice of the Peace duties as specified in the terms of his appointments.

For simplicity, I would suggest that part-time Justices of the Peace be placed into 3 categories - quarter-time, half-time and three-quarter time Justices of the Peace, receiving one-quarter, one-half or three-quarters of the salary that a full-time salaried Justice of the Peace would be receiving at his level. There should be no Justices of the Peace at less than one quarter salary and if any Justice of the Peace spends more than three quarters of his time on Justice of the Peace duties then he should be a full-time salaried Justice of the Peace.

Superficially, it would appear that the objections to the present piecework fee system could be met by substituting for it an hourly fee system or a per diem fee system based upon the actual hours a day spent on Justice of the Peace duties. But, while this would be an improvement, it would not solve the problem that the amount of money earned by a Justice of the Peace must not be and must not be seen to be dependent on the good graces of the police. An hourly or daily fee system is not much good if no work is directed to the Justice of the Peace to enable him to earn his hourly or daily fee. The only system that in reality and in appearance will preserve the independence of Justices of the Peace is one that does not depend upon work being steered to the individual Justice of the Peace. If we really believe in this necessary independence, in this necessary keeping of the Justice of the Peace and the police at arm's length, then we must be prepared to pay for it. Under the scheme I propose, the cost of running the Justice of the Peace system will increase, though not perhaps as significantly as might appear at first blush. Furthermore, there will be occasions where Justices of the Peace will be paid for doing very little work, just as on occasions there will be Justices of the Peace who will give more of their time willingly and out of a sense of duty without being paid for it. The quid pro quo for paying the cost of an independent judicial system is that while there may be a week or so when the Justice of the Peace has no duties and is not called upon, even though he is in receipt of a part-time salary, there will be other weeks when he does more than he is contractually obliged to do or when he may be called upon at night or some other inconvenient time to issue a search

warrant or bail out an accused person. I have absolutely no doubt that it is worth it.

The civil service Justice of the Peace is in another category. He is a person already holding an appointment within the civil service - usually as a court administrator - who is also commissioned as a Justice of the Peace. As a civil servant, his salary is that of the employee of his rank, whatever that might be though, as I have stated earlier, the practice is that the Justice of the Peace commission automatically moves him up one rank to the salary level next above. The commission, thus, in itself, gives him some monetary benefit. In addition, he is entitled, if in an area where this practice prevails, to the additional fees payable for sitting outside the normal working hours.

I find the practice of appointing such civil servants Justices of the Peace somewhat peculiar. It is said that there is great convenience in having them hold Justice of the Peace commissions in order to be available for matters requiring the attention of a Justice of the Peace, when other Justices of the Peace are not available - such as issuing subpoenas or signing affidavits. If this were the justification, it would suffice for such persons to receive a D direction. In fact, of the 135 civil service Justices of the Peace, 127 have an A Expanded, A or B direction and only 4 have a C direction and 4 have a D direction.

It is also said that it is convenient to have a Justice of the Peace available on those occasions when the Provincial Court Judge is sick or otherwise unavailable in order to adjourn proceedings. There may be some merit in this. Nevertheless one must first face the basic question of principle, viz. whether such civil servants should be sitting Justices of the Peace. I can only respond by categorically stating that the practice is highly improper and should cease. Sitting Justices of the Peace are judicial officers, as I have mentioned throughout this inquiry, and civil service status is inconsistent with judicial office. I am not so sure that it is inconsistent with those functions of a Justice of the Peace which do not require him to sit as a judge and, if that is so, I suppose one could not object strenuously to civil servants receiving Justice of the Peace commissions and a C or D direction only, though I am bound to say that if other Justices of the Peace are available at all reasonable times, as I think they should be, I do not see the necessity even for this practice. It also has the inherent danger that such a civil servant may find himself devoting too much time to his Justice of the Peace duties to the detriment of his administrative duties.

Furthermore, even those functions of a Justice of the Peace encompassed by a D direction requires him to retain his objectivity and independence of action, which may be difficult for him to do if he is wearing two hats. The plain fact of the matter is that the appointment of civil service Justices of the Peace (however understandable originally) is now perceived in a large number of cases to be a reward, a means of increasing the income of a civil servant at a pegged level of salary within the civil service and I can only categorize this as a perversion of judicial appointment.

In sum, I do not recommend that the practice of appointing administrative Justices of the Peace cease, but that the wholesale practice of appointing court administrators Justices of the Peace as a virtually routine basis cease. Such an appointment should be exceptional, should be limited to cases of actual need and should be carefully screened by the senior judge to ensure that an administrative Justice of the Peace is not regarded as a substitute for a non-civil service Justice of the Peace. I see nothing objectionable in the administrative Justice of the Peace being available to handle purely technical or emergency matters (though one might wonder why the intervention of a Justice of the Peace should be necessary at all if the matter is purely technical) but beyond that it is not fitting or proper for him to assume any Justice of the Peace functions.

3. The Objectives of the Recommendations

In the next Chapter, I shall set out my recommendations according to the terms of reference of this inquiry. I have formulated them with specific objectives in mind, and I should like, at this stage, to set out those objectives.

Our system of the administration of criminal justice has developed over the past eight hundred years or so by trial and error and slow advancement until we can now say that in general our present system has stood the test of time. It balances the interests of society in the enforcement of the law and the conviction of the guilty with the interests of the individual against arbitrary action and the conviction of the innocent. But the system is costly and, to some, cumbersome. If short-cuts are attempted or, what is worse, countenanced, we end up with a system that only pays lip-service to the values inherent in it, while in practice its inherent safeguards become meaningless or at least reduced. In this situation, there will develop in the public a cynicism towards the administration of justice and a disaffection with all its agencies. I do not think that we have yet reached that stage but I do believe that

unless the process is reversed that stage will be reached. And the front line of attack in the reversal of the process is the reevaluation and restoration of the office of the Justice of the Peace.

In fact the importance of the Justice of the Peace in our system can best be seen by considering what safety checks there are against totalitarianism and abuse and by imagining what the situation would be like (indeed, to some extent is in danger of becoming) if they are impeded in the performance of their duties or are not given the absolutely necessary moral and financial support to encourage them to exercise their duties responsibly and diligently.

The Justice of the Peace is the first line of defence against abuse of process. He ensures that arrests on warrant are justified; searches made without his prior authorization are, except in those cases otherwise provided, illegal; seized property is within his custody and control to be kept, disposed of or returned according to his orders. In most cases, it is he who can ensure the release of persons detained before trial and sets the terms of that release; it is he to whom the private citizen can go to initiate proceedings not only against other private persons but against the police or members of the government themselves - he is in fact the original, and still essential, ombudsman. He determines the guilt or innocence of accused person in a vast number of minor cases - minor in gravity but actually they are likely to be those cases where most citizens come into contact with the criminal process.

If the office of Justice of the Peace were abolished, or what is more to the point, if the office is demeaned or reduced in function either directly or indirectly, then these safeguards and rights of the citizen are inevitably made less secure. What has happened (and I do not think it has been anyone's fault or any conscious decision) is that over the past hundred years or so - beginning with the gradual introduction of the "police magistrate" and the removal of the Justices' of the Peace responsibility of directing and controlling the constabulary - the prestige and visibility of the Justice of the Peace in the community has been slowly whittled away. In no small measure, the malaise and disaffection of the man in the street to the entire criminal justice system - towards the police, the courts, the trial process - is attributable to the diminution of the influence and presence of the Justice of the Peace. We now have an opportunity to restore - at some cost, though the cost in terms of the overall cost of the administration of justice in this province is minimal - the Justice of the Peace to his position as both judge and protector of the individual.

The Justice of the Peace must be capable, independent and fearless in the performance of his duties and the exercise of his office. He must understand and appreciate what his powers and duties are. Therefore the system must attract and encourage the development of the right sort of person that we want as a Justice of the Peace. The other side of the coin is that the system must operate efficiently, that Justices of the Peace are available when needed, and at the place they are needed and that there must be a method of dismissing Justices of the Peace who do not measure up to the required standards. Above all there is the cost factor. The system must be financed and supported up to the level where these objectives can be met but the cost must be within public tolerance and legitimate fiscal restraints.

A Justice of the Peace should therefore be qualified to accept his appointment; should undertake initial training as necessary and keep up to date with all current developments that concern him. He should be appointed for locations where his services are required and no one should be appointed who cannot meet the necessary standards. He should enjoy independence in his decision-making functions, free from pressure or interference and thus must enjoy some measure of security in his office, subject to being dismissed only for cause and only after due process. He should be paid a salary that is in keeping with the importance of his office with the fringe benefits such as disability pay and pension that accompany it. He should be provided with office facilities that enable him to do his job properly, that will reflect his status - facilities that will command some respect from the police and the public, as well as lawyers and administrative officials. Facilities to which the public have free access but which are nevertheless private and reasonably secure.

On the other hand, he must be subject to the administrative control of his senior whose duty is to see that the court system functions smoothly for the benefit of the public. He is subject to obeying the law and following the legal authorities that bind him. He must be present at the times and places specified in the terms of his appointment.

It seems to me that all these conditions can and must be met. If they are, we will have, in Ontario, not cheaply and certainly not as cheaply as hitherto, a system that reinforces at the threshold those values upon which the common law principles of justice depend.

I now turn to my specific recommendations.

IV. SPECIFIC RECOMMENDATIONS

1. The Organization of the Office

As I have already stated, I am not quite so easy in my own mind, as others have hitherto assumed, that the Province has the power to limit the jurisdiction of Justices of the Peace over federal matters, when the federal law grants certain powers and imposes certain duties upon "Justices of the Peace" and by definition includes all "Justices of the Peace". But I am prepared to assume that it does have the power or that, if it does not, it is a relatively simple matter to correct. It is clear that from a practical point of view different Justices of the Peace may be qualified to do different things.

The present system of Directions seems unnecessarily complicated. There are at the moment the five types of Direction, A Expanded, A, B, C and D. The first two are virtually identical except that an A Expanded Direction empowers the Justice of the Peace to hear and determine certain offences under federal legislation. It is understandable that it was felt that a few Justices of the Peace should have jurisdiction to hear these cases, but, given my recommendations as to training and education (indeed, everything I propose here is subject to that caveat), they hardly seem worth creating a special category for. A B Direction Justice of the Peace, has no power to preside over Provincial Offences Court but does have jurisdiction to conduct Bail Hearings. I do not like the implication that somehow Bail Hearings are less significant than the trial of accused persons in provincial offences matters. Bail Hearings very much affect the liberty of the subject and the rights of accused persons, and may, in practice be much more important than determining whether a person should pay a \$10 fine or not. To my mind, any Justice of the Peace thought qualified to conduct Bail Hearings is also qualified to preside over Provincial Offences Court, and vice-versa. I would therefore propose the amalgamation of the existing Direction A Expanded, and A and B into a single category.

Such Justices of the Peace are judicial officers in every sense of the word, and in my opinion some designation should be found to make this abundantly clear if the simple designation Justice of the Peace does not. The obvious title would be Magistrate which is precisely what he is, but given the

terminology used in the Code and the history of the office of "magistrate" in this Province and elsewhere, I do not think that title would be practical or appropriate - at least given the present situation. Perhaps if the nomenclature used in the Code is revised, it may be possible at some future date. The title "Recorder" has been suggested but, at least historically, a Recorder was a person, legally qualified, presiding over Quarter Sessions.

"Stipendiary" or "Stipendiary Justice of the Peace" is another possibility but to my mind this denotes primarily that the Justice of the Peace is in receipt of a salary as opposed to being paid on a fee basis or not being paid at all. Since I shall later be recommending that all Justices of the Peace should be in receipt of some sort of salary, it would not be a very useful way of distinguishing one category of Justice of the Peace from another. For want of anything better, I propose that all Justices of the Peace who would, under the present system, have A Expanded, A or B Directions, be designated Presiding Justices of the Peace with jurisdiction to hear and determine certain federal offences, to preside over Provincial Offences Court and to conduct Bail Hearings (and, of course, exercise all included jurisdiction).

The real cut-off in jurisdiction comes between the present B and C Directions. A C or D Direction Justice of the Peace may issue warrants and summons and adjourn criminal cases in the absence of a Judge or Presiding Justice of the Peace, but has no adjudicative powers. A D Direction Justice of the Peace may not, however, issue search warrants. Again, while I understand the reasons for distinguishing between a C Direction and a D Direction, it is my opinion, that given proper qualifications and training, any Justice of the Peace thought qualified to issue an arrest warrant ought to be qualified to issue a search warrant. I propose, therefore, the amalgamation of the C and D Directions with a single category of Justice of the Peace, without the designation "Presiding". If one wishes to be more specific, I suppose "Justice of the Peace, non-Presiding" is possible if cumbersome. "Signing Justice of the Peace" I reject out of hand since it implies that his only function is to affix his signature to documents - an implication that must be avoided at all costs. If any Justice of the Peace thinks that that is his only function, he is not qualified to be a Justice of the Peace.

I shall discuss in a moment the method of deciding which Justice of the Peace shall receive which designation, but let me state here categorically that no so-called "Administrative Justice of the Peace" should ever be appointed a

Presiding Justice of the Peace. For the reasons I have already outlined, civil service status is simply not consistent with judicial office, cannot be justified on the grounds of expediency and is quite unnecessary. As I have stated, I do not see any necessity at all for the wholesale appointment of administrative officials as Justices of the Peace in either category, but on those occasions when it is considered necessary or desirable, the appointment should only be as a non-Presiding Justice of the Peace.

In its brief to me, the Association of Provincial Crown Administrators point out that in excess of 90% of all court administrators in this province are Justices of the Peace and almost all of them hold an A Direction. 75% of them preside in court and over 50% of them preside in court at least one day a week. It states "It is overwhelmingly felt by our members that from a practical point of view the Court Administrator should continue to hold the office of a Justice of the Peace and continue to preside in court on a fill-in basis only".

I find it difficult to understand how, if 50% of them preside in court at least once a week, they can be said to be sitting on "a fill-in basis only". It seems quite apparent that they are being utilized routinely to do the work of a sitting Justice of the Peace. I am not sure what is meant by "fill-in basis only". If it means acting in an emergency, then an appointment as a Justice of the Peace (non-Presiding) would enable the court administrator to adjourn criminal cases, or deal with urgent informations or warrants. If it means acting when no other Justice of the Peace is available, then if this occurs at least once a week in half the localities in the province, it is perfectly clear that an additional Justice of the Peace (not necessarily full-time) is required in those localities. I am simply not convinced that court administrators need to be or should be appointed Presiding Justices of the Peace.

I might, at this point, add (though it seems rather beyond my terms of reference) that I do not understand why it is thought necessary (both under the Code and other federal statutes and under provincial legislation) to have so many routine administrative matters dealt with by a Justice of the Peace, when almost all of them could equally well be done by a Commissioner of Oaths. If the functions of a Justice of the Peace were limited to those which required someone to make a decision (i.e. whether to issue a search warrant or criminal process or to adjudicate or grant bail) and allow all non-decision-making functions to be performed by a Commissioner, any reasonably competent secretary could receive a Commission for

Oaths and reduce the necessity for so many Justices of the Peace, free the Justice of the Peace from the tedious routine functions and elevate his status to where it should be. Of course, this would require enabling legislation both at the federal and provincial level and a careful delineation of which function is decision-making and which is routine signature-affixing.

I recommend, therefore:

- (1) That all Justices of the Peace be classified into either Presiding Justices of the Peace or Justices of the Peace. Presiding Justices of the Peace should have the power and duty to:

- (i) Preside over Provincial Offences Court
- (ii) Conduct Bail Hearings
- (iii) Preside over certain federal summary conviction proceedings
- (iv) Issue warrants or summons
- (v) Deal with license suspensions, etc.
- (vi) Issue search warrants
- (vii) Adjourn criminal cases in the absence of the Judge.

- (2) Justices of the Peace who are not designated as Presiding should have the power and duty to:

- (i) Issue warrants or summons
- (ii) Issue search warrants
- (iii) Adjourn criminal cases in the absence of the Judge.

- (3) That no court administrator be appointed a Justice of the Peace in either category unless it is demonstrated to be necessary (not merely convenient) and then only as a Justice of the Peace non-Presiding.

- (4) That a study be made to determine which of those functions now assigned to a Justice of the Peace could equally well be performed by someone such as a Commissioner of Oaths and that the function of all Justices of the Peace be limited to those requiring some form of decision-making process.

2. Control and Supervision

Let me first of all try to sort out what we are talking about. If there is one word that had caused all the

trouble, it is the word "direction" used in the Justices of the Peace Act.

No one - not even the Chief Justice of Ontario - can direct, by administrative means, a Justice of the Peace to come to a particular decision. A fortiori, no administrative official can do so, nor the Attorney General himself. Directing a particular decision can only be achieved within the legal system - by a statute or by a superior court by way of appeal or by way of prerogative writ or other review. This principle must be maintained. Even more importantly, it cannot be subverted. No Justice of the Peace is answerable to anyone, outside the established appeal or review procedures, as to why or how he made a particular decision, nor, subject to being dismissed for cause after due process, is he to be pressured, overtly or otherwise, into coming to any particular decision. "Cause" in this context, of course, as I shall discuss later, does not mean reaching unpopular or unwelcome decisions but being incompetent and unable to perform his duties. Whatever we are talking about, therefore, when we talk about "directing" a Justice of the Peace we are not talking about interference with his judicial freedom and obligations.

As, however, I have discussed above, "direction" in the sense of "assignment" is not at all the same thing. Any system of administration of justice depends upon some method of ensuring that services are provided where needed, that judges (at all levels) are where they are supposed to be at the right time and that judges are assigned to sit when and where they are required. If this is what is meant by "direction" then no reasonable person can have any objection to Justices of the Peace being directed. I shall return to a consideration of this shortly.

A third interpretation of "direction" is as to the function of a particular Justice of the Peace and this is the interpretation that has been adopted by the device of the A, B, C or D Direction - that is to say, it not only directs but also designates powers and jurisdictions by administrative means. I am bound to say that I find it intolerable that a person, appointed by Order-in-Council a Justice of the Peace, should then be totally dependant upon administrative direction as to whether he even has the capacity and jurisdiction to perform certain functions. In part, this has resulted from haphazard appointments as Justice of the Peace in the first place and only then making the decision as to how qualified that appointee is. At present, Directions can be revoked or reduced without any due process whatsoever and this clearly violates every principle of judicial independence. Given the recommendations I shall later

make as to qualifications and appointments, it is my view that appointment as a Presiding Justice of the Peace or as Justice of the Peace non-Presiding should be by Order-in-Council in the first place, and that while a Justice of the Peace non-Presiding may be promoted to Presiding Justice of the Peace (also by Order-in-Council and also only after the review to be discussed below) no Presiding Justice of the Peace should be demoted to Justice of the Peace non-Presiding and no Justice of the Peace should have his Commission revoked save by the due process machinery to be examined later.

In other words, I do not think that appointment of a Justice of the Peace as to his function should be by administrative means and is not properly to be included in the word "direction". In my view, the word is properly to be interpreted only in the sense of "assignment of duties" and it is in this context that I return to a discussion of the direction and control of Justices of the Peace.

As I have stated, Justices of the Peace, no less than any other judge must be assigned his duties and someone must have the ultimate responsibility of making this assignment and ensuring that assignments are obeyed. Wilful failure to obey an assignment, is ultimately a breach of duty and may, in extreme cases result in some form of disciplinary proceedings. The question arises firstly as to who should "direct" Justices of the Peace in this sense.

At present, it is the Chief Judge of the Provincial Courts (Criminal Division, or Family Division as the case may be), though he may delegate this responsibility (and, in practice, does so delegate) to the appropriate (senior) Provincial Court Judge. In fact the routine assignment of which Justices of the Peace sits where and when may be done by the Court Administrator or, where there is one, by the local "Senior Justice of the Peace" (or in Toronto the "Supervising Justice of the Peace") or, in some localities matters will be settled by agreement among the Justices of the Peace themselves. How it is done in practice, is less important than who has the ultimate responsibility and who has the power to enforce (by disciplinary process if necessary) his assignments and, in the final analysis, it is, under the present system, the Chief Judge.

A fundamental question and one that has given me the greatest concern is whether the Provincial Court Judiciary is the proper body to be directing (in this sense) the Justices of the Peace. Against the present system, the following arguments have been put forward.

(1) In all other levels of the judiciary, the direction - in the sense of assignment - of judges is the responsibility of that court itself in the person of the appropriate Chief - whether it be the Chief Judge of the Provincial Court, the Chief Judge of the County Court or the Chief Justice. No one dictates from above the assignment of judges on those levels.

(2) The present system leads at least to the appearance of undue pressure on a Justice of the Peace to conform to the opinions of his superior or be assigned inconvenient or unpopular duties. Thus the power to "direct" may become a power to interfere with the judicial independence of the Justice of the Peace.

(3) This, in turn, may be aggravated now that the Provincial Offences Act provides for an appeal in some cases from the decision of a Justice of the Peace sitting as a Provincial Offences Court to a Provincial Court Judge who may be the very judge directing the Justice of the Peace. This puts both the Justice of the Peace and the Judge in a most difficult position.

(4) The present system depreciates the prestige of the Justice of the Peace, as though it is felt that Justices of the Peace are not able to order their own affairs.

(5) The present system is inefficient. It operates on a "locality" basis - each locality being an independent unit. The result is that courtrooms remain empty half the time; a sitting Justice of the Peace may find that on one day he has hardly enough work to keep him occupied for a couple of hours while on another day there may not be enough Justices of the Peace available to complete the business.

These are all reasonable criticisms of the present system but arguments advanced in support are:

(1) As far as provincial offences are concerned, the Provincial Court Judge and the Justice of the Peace are each an integral part of the same system and chaos would result if one aspect of the system was directed and administered entirely separately from the other.

(2) The Provincial Court Judge, being on the spot, is best able to respond to immediate needs or local conditions.

(3) The Provincial Court Judge and the Justice of the Peace complement each other in many of their functions, such as

Bail Hearings, and there should be a single administration for both levels.

(4) The Provincial Court Judge is best able to keep an eye on local Justices of the Peace to help them in difficulties, to give them advice and, ultimately, initiate disciplinary proceedings if it becomes necessary.

The fundamental question is who should have the ultimate responsibility for directing Justices of the Peace in their duties? Should it be, as at present, the Chief Judge of the Provincial Court? Should it be some sort of Chief Justice of the Peace exercising those functions in respect of Justices of the Peace now exercised by the Chief Judge? Or should it be some civil servant with expertise in court administration?

This last has been suggested to me in the interests of efficiency, and I suspect that it is quite true that all of our courts at every level are considerably less efficient than they might be if they were run by an "expert". He could ensure that courtrooms are used to greater advantage than they are now; he could ensure that Justices of the Peace sit where and when needed. I have no doubt that this Province must make far greater use of such expertise than it has in the past. But I do not think that this is the same as ultimate responsibility in the sense that I am talking about. On the level of the practical day-to-day running of the court system, clearly the help and advice of the expert is essential but that does not mean that he must also have the ultimate power to control and enforce his directions. I, quite simply, balk at the suggestion that a civil servant should be the "supervisor", in any capacity, of any judicial officer even of the lowest level. The price one pays for judicial independence which in turn is what guarantees the protection of the individual and his access to real justice might well be "inefficiency". Given the choice, I would rather pay this price than have an "efficient" system with no justice. This is not to say that I do not think there is room for improvement. Those involved in court administration must have a greater input into the whole system of courtroom organization and assignment of judges - but in an advisory capacity only, not in a controlling capacity.

This leaves us with the choice of either keeping the present system or creating a new office to supervise the assignment of Justices of the Peace. Before I try to suggest which choice we should adopt, let me say at this point that the directing of Justices of the Peace in this sense entails not only assigning who does what and where but also, as I shall later point out, being involved in the decision to appoint in the

first place, and in the decision as to who should be appointed and in what capacity. It must also entail being involved in the training and education of Justices of the Peace, in ensuring that their facilities are adequate, in ensuring that they are kept abreast of current developments, in providing them with advice and help when they need it. It will also involve the question of salaries, promotions and so on and, if it ever becomes necessary, the discipline of Justices of the Peace and the recommendation for any action. Thus, what I envisage, as coming within the responsibility of whoever ultimately "directs" Justices of the Peace is considerably more than merely assignment of duties.

Placed in this context, it seems to me virtually impossible to expect the Chief Judge to assume this responsibility, in addition to all his others. If the direction is to remain in the hands of the Provincial Court judiciary then it seems to me that a specific Judge will have to be designated as the director or supervisor of Justices of the Peace, perhaps with the specific title of Associate Chief Judge (Coordinator of Justices of the Peace).

If control is removed from the Provincial Court judiciary and placed in the hands of the Justices of the Peace themselves, then we face some considerable difficulties. The person chosen as the Supervisor or Director would have to be a Justice of the Peace himself, he would have to be experienced in all aspects of the Justices of the Peace functions and duties, familiar with the court system, able to give advice and assistance on both practical and legal matters and sufficiently senior to command respect and have authority. In short, he would seem to be a person who would have to have virtually all those qualifications which we expect of a Provincial Court Judge. There may, indeed, be a Provincial Court Judge who would be prepared to move "sideways" from being a Provincial Court Judge to being the Supervisor of Justices of the Peace since I assume that, in any case, his salary and conditions of work would be the equivalent of a Provincial Court Judge. But if that is the case, I am not sure that one has done very much except pay lip-service to the principle that Justices of the Peace should be directed by another Justice of the Peace. All things considered, (and I come to this conclusion only after a great deal of doubt and hesitation) I conclude that the control and supervision of Justices of the Peace in this province should remain with the Provincial Court judiciary but that a specific Provincial Court Judge be assigned or appointed with the rank and designation of Associate Chief Judge of the Provincial Court (Coordinator of Justices of the Peace) who, in addition to his other responsibilities which will be discussed later in this

Chapter, will have the ultimate responsibility for the direction and supervision of all Justices of the Peace, which responsibility he may delegate to the local or senior Provincial Court Judge where appropriate. Thus I do not recommend any great change in the present system of "directing" Justices of the Peace save that I do not include in this word the present concept of issuing jurisdictional "Directions", and I recommend that considerably more functions be given to whoever "directs" Justices of the Peace than merely assigning duties.

Another advantage I see in this system is that, for the first time, the precise role of the Associate Chief Judge (Coordinator of Justices of the Peace) would be clearly defined. More importantly, so would the role of the local (senior) Provincial Court Judge. I think it is fair to say that at present different Provincial Court Judges have different views on what their role vis-a-vis Justices of the Peace is. Some judges, not to beat about the bush, are virtually autocratic and dictate to the Justices of the Peace not only when and where they will sit, but what decisions they will come to. Others adopt a completely "hands-off" policy and leave the Justices themselves free to decide when and where they will sit and free to come to any decisions they wish. Of course, most judges are in between these two extremes. But the plain fact of the matter is that this inconsistency has arisen because there is simply no clear-cut delimitation of their respective functions. Under the proposed scheme, it would be clearly defined where the authority of the Associate Chief Judge begins and stops; where any delegated authority of the local judge begins and stops; and where the Justice of the Peace must be left free to exercise his judicial independence.

Thus, I recommend:

- (1) That Justices of the Peace be appointed by Order-in-Council, to be either Presiding Justices of the Peace or Justices of the Peace (non-Presiding), the former only having jurisdiction to hear and determine cases to conduct bail hearings.
- (2) That, having been so appointed, their status cannot be changed save after all due process (to be examined later).
- (3) That an office of Associate Chief Judge of the Provincial Court (Coordinator of Justices of the Peace) be established to have general responsibility for the supervision of all Justices of the Peace in the Province, which supervision may be

delegated on an ad hoc basis to appropriate local judges.

3. Qualifications and Appointments

As I have discussed in a previous Chapter, exactly what is meant by "qualifications" is a matter of some doubt because no one has ever actually tried to articulate precisely what is meant by being qualified to be a Justice of the Peace. Under my proposals, this would, of course, depend upon whether one is referring to a Presiding Justice of the Peace or a Justice of the Peace (non-Presiding) and I see no reason why the qualifications, appointment or for that matter, the training and education have to be the same for both categories.

Any Justice of the Peace, of either category, is, as I have been at pains to explain, an important person in the criminal justice system. He must be able to withstand pressure, to make independent decisions and to appreciate problems. Many of the present Justices of the Peace including some very good ones, have little formal education but some experience in the process. I hesitate to recommend any mandatory level of education but it seems to me that in this day and age, given the educational requirements from other professions such as police officers or prison custodial officers, it is not expecting too much to expect that all future appointees as Justices of the Peace should have a formal minimum educational level of Grade XII. I recognize that this may cause problems in native communities for which exceptions may have to be made (to be discussed separately). It is also possible that we would close off such an appointment to someone who would be potentially a very good Justice of the Peace but who lacks the formal educational requirement but there is no reason why he could not upgrade his high school education to meet the requirement.

In fact, I would hope that as far as Presiding Justices of the Peace are concerned, Grade XII would be considered only as a basic minimum educational level. It seems to me that a person put in the position of judging others, of having to listen to arguments, of having to make sometimes difficult decisions, of having to pass sentence and of having to decide on the interim release of accused persons should preferably be someone with a higher educational achievement. This may not be so necessary in the case of a Justice of the Peace non-Presiding. In short, I think it is sufficient to state as a requirement, only that the appointee have Grade XII education, but that preference should be given to candidates with higher qualifications when consideration is being given to an appointment as Presiding Justice of the Peace.

It may even be possible that, given at least an adequate salary, young lawyers (who need not necessarily be appointed at the bottom of the scale and for whom, presumably, the full training programme would not be necessary) would be attracted to the position for two or three years in order to gain practical experience in the running of the criminal justice system.

One assumes, of course, that in addition a Justice of the Peace will be a person of some maturity and discretion but I think it quite inappropriate to specify any particular age requirement. Given the appointment process I am about to describe, this should cause no problem.

Those considerations aside, when is a person "qualified" to be a Justice of the Peace? This is about as difficult to answer as deciding when a person is "qualified" to be a judge at any level. "Good character" is clearly essential but this means "good" in the social sense. He must be reasonably intelligent, able to understand and appreciate his duties, capable of making independent decisions and able to act impartially and fairly.

I do not think that a pre-existing knowledge of the court system is, or should be, a prerequisite for qualification. At present, a high proportion of Justices of the Peace, particularly in the larger centres, are from "within the system" - people with a pre-existing knowledge of the court structure. But this is explicable given the present "old-boy network" system of appointments and the present total inadequacy of training and education. It is not surprising that in the larger centres one tends to look for appointees from among those one already knows and who have already demonstrated familiarity with the routine processes of the court and pre-trial procedure. In my view, this is not a desirable development. We should be looking for the best person available whether he is from within the system or not. A pre-existing familiarity with the system may mean that his training need not be as detailed as that of someone with no such familiarity but it should not, in itself, be any qualification for appointment.

I should add here that there may indeed be some persons who are not qualified to be Justices of the Peace for some other reason. Some disabilities seem fairly easy to state, such as prior convictions for serious offences, but others are less easy to specify. In the case of part-time Justices of the Peace there may be a problem with inconsistent or undesirable employment. Elected public office, for example, I do not consider consistent with judicial office. Retired police officers

may or may not be qualified - much, I think, depends upon his rank at retirement and the particular locality. Employment that brings a Justice of the Peace into close contact with the police I also consider undesirable. Rather than attempt to make a list of disabilities, however, it seems to me preferable to leave it to the good sense of the Associate Chief Judge, the Justice of the Peace Review Council and the officials at the Attorney General's ministry. The variables are so great and circumstances may differ so much from locality to locality or individual to individual that I think it is sufficient merely to state that those responsible for recommending appointments to the Attorney General be aware of the desirability of not appointing a person as Justice of the Peace who may have or appear to have some conflict with his responsibilities as a Justice of the Peace.

The plain fact of the matter is that so long as proposed appointments are mooted by word of mouth, the opportunity to apply tends to be limited only to those who are in the know and they tend to be limited to friends or associates of those making the initial input. This is a problem not limited, of course, to the appointment of Justices of the Peace but is endemic to all judicial appointments, and many public appointments. One may object that anyone can apply to be appointed a Justice of the Peace but one does not apply unless one is aware that there is an opening and one is aware that one's application, if not embraced with open arms, at least will be treated seriously.

It seems to me that the proposed Associate Chief Judge (Coordinator of Justices of the Peace) must take a much more involved role in appointments. The first consideration is whether there is a need and hence a vacancy, for a Justice of the Peace in any particular locality. Probably this initiative will come from the local senior Provincial Court Judge or perhaps the Senior Justice of the Peace through the local judge. This request should then be carefully reviewed by the Associate Chief Judge after consultation with the local judge, the court administrator, the Crown Attorney and any others, such as the other Justices of the Peace in the area, who may have an interest in the matter. If satisfied of the need, the request should then be forwarded by the Associate Chief Judge to the Ministry officials with supporting documentation. If satisfied of the need, the Attorney General would then give his approval for an appointment.

At this stage, in my opinion, it is absolutely essential that some publicity be given of the proposed appointment. I do not think this need by excessive - perhaps a notice

posted in the City Hall (or equivalent place) perhaps a notice in the Court House, perhaps even a notice in the local newspaper. The notice should indicate the type of appointment (Presiding Justice of the Peace, Justice of the Peace non-Presiding, full or part-time) and the qualification required and the general nature of the duties involved.

There may be a large response; there may be a minimal response. The responses should set out in writing the qualifications of the applicant, his credentials, his reasons for applying, and so forth, and should be sent to the office of the Associate Chief Judge. I would hope that his office would be able to cull the applications down to a short list of one or two - perhaps up to four or so - possible candidates. Perhaps in some cases one candidate only would appear as possible, perhaps sometimes no candidate would appear suitable, in which case, the process would have to be repeated. Arrangements should then be made for those candidates to be interviewed by the local (senior) Provincial Court Judge as to their suitability. The Associate Chief Judge should develop guidelines, along the lines I have suggested, for the assistance of local judges in determining "suitability". The local judge should then forward a report to the Associate Chief Judge with his recommendations and reasons. It does, I must admit, sound a little complicated but with the development of guidelines and perhaps standard forms, I do not think it is putting an undue burden on the local judge.

At this stage, the name proposed should be submitted to the Justice of the Peace Review Council (the composition and duties of which I shall discuss later) for approval. Only if the candidate is approved by the Council should the name then go forward to the Attorney General, with all supporting documentation, for his approval and submission to the Cabinet.

Some such scheme seems to me to be the best way of ensuring that the ultimate decision to appoint remains with the Cabinet (through the Attorney General) but also of ensuring that political input never becomes undue and that every effort is made to find the most suitable person, though the success of such a scheme will very much depend on there being adequate training and education programmes, that I shall discuss in the next section.

I therefore recommend:

- (1) That in general a minimum educational level of Grade XII (or its equivalent) be established for all future appointments as Justice of the Peace.

- (2) That vacancies for appointments be determined by the Associate Chief Judge (Coordinator of Justices of the Peace) and submitted to the Attorney General for his approval.
- (3) That some form of publicity be given to the existence of a vacancy and applications invited.
- (4) That a short list be prepared by the office of the Associate Chief Judge from the written documentation and the finalists be interviewed by the appropriate Provincial Court Judge.
- (5) That no candidate be proposed for appointment to the Attorney General unless he has first been approved by the Justices of the Peace Review Council on the basis of the documentation submitted to it by the candidate himself and the appropriate Provincial Court Judge.

4. Training and Education

I should like to consider this in two stages, viz. initial training on appointment and continuing education after appointment.

If my proposals are adopted, a new appointment may be as a Presiding Justice of the Peace or as a Justice of the Peace non-Presiding. He may be a person already having some familiarity with the criminal justice system, or he may be coming to his appointment with no knowledge at all. He may be a Justice of the Peace, non-Presiding who is being appointed a Presiding Justice of the Peace.

What should such persons be expected to know? I do not think it is necessary or appropriate for me to set out in detail a curriculum of training - that, I think, should be left to the office of the Associate Chief Judge to develop - but in broad terms one can set out what would be desirable:

- (1) The criminal process from commission of the offence, through investigation, search, questioning of suspects, arrest with or without warrant, the laying of informations, private complainants, judicial interim release and the trial and appeal process.

- (2) Elements of substantive criminal law, the common offences, requisite elements for liability, defences.
- (3) The basic laws of evidence, and procedure, both federal and provincial.
- (4) The sentencing process, the aims and purposes of the criminal sanctions.
- (5) The duties and powers of the Justice of the Peace in relation to all of these.

Perhaps a non-Presiding Justice of the Peace is not so concerned with evidence and the sentencing process as a Presiding Justice of the Peace but it seems just as desirable that he too have a grasp of all the other matters set out.

In my opinion, none of this can be achieved simply by an "apprentice" system, which seems to be the case currently. Sitting with and observing a more experienced Justice of the Peace, may teach the observer the ropes in the sense of routine practices and deciding which forms to use on which occasions but it cannot teach reasons, it cannot teach an awareness of the process and how the Justice of the Peace is an integral part of the whole process. I see nothing wrong with an apprentice system as part of training but it is simply inadequate as training in itself.

There simply must be a formal course of instruction and education with a curriculum something like the one I suggest. Those already having a familiarity with the system through being a court reporter or a court administrator may find some small part of it unnecessary or repetitious but the curriculum I envisage is less concerned with formalities as with basic substance and I do not think that court reporters or administrators are necessarily or even likely to be familiar with such fundamental matters. I would therefore make a training programme mandatory for all new appointees regardless of their background.

The cost of the programme must be borne by the Government, including the expenses and salary of those attending. There are probably a sufficient number of appointments made in the Province to justify such a programme being held twice or three times a year at some suitable location. The actual duration of the course could, again, be left to be worked out by the office of the Associate Chief Judge, but I am

thinking of something along the lines of four weeks, perhaps given in two two-week periods.

The drawback with such a programme, apart from the cost which I think must be borne, is that appointments tend to be made throughout the year rather than at specific times that would enable each appointee to embark on a training programme immediately. I do not think this is an insuperable problem. An appointee, pending his enrollment in the programme, could spend his time observing other Justices of the Peace working, he could sit in court to observe, he could be studying material and he could even be given some minor responsibilities that would not require the expertise that the training programme will give him. Possibly all appointments could be made at roughly the same time twice a year, rather than throughout the year, to ensure that the time between appointment and the training programme be as short as possible.

I do not anticipate any trouble getting staff for the programme. Many judges, Crown Attorneys, defence lawyers and academics would be only too pleased to offer their services.

Along with the training programme, all new appointees should be given a set of appropriate materials. These, too, can be developed by the office of the Associate Chief Judge but should include all relevant statutes and regulations and such other material as is felt desirable and as is developed in due course.

I do not think there should be any formal examination at the end of the training period. If the appointee is truly qualified in the first place, it is the attendance at the programme that is essential and his participation in it, rather than his reaching any particular level of examination success. I suppose it is possible that one might later discover in the exceptional case that a person appointed a Justice of the Peace, in spite of the initial assessment of his qualification and in spite of his attendance at a training programme is simply incapable of performing his duties satisfactorily. If this does occur, then it seems to me that such a Justice of the Peace (who, I hope, would be very rare) should be dealt with under the procedures for dismissal for cause - the cause being his incompetence. This will be discussed at the appropriate state of my report.

Where a Justice of the Peace non-Presiding is appointed a Presiding Justice of the Peace, it would be necessary, of course, only for him to complete that part of the curriculum that he has not completed on his initial appointment, if any.

As I suggested, it may be felt that all Justices of the Peace, regardless of their category, should undergo the same training since what functions they perform should make no difference to the need for them to appreciate the total system. But it may be that this will be seen as unnecessary or unduly expensive. In that case, one would envisage the training programme for a Justice of the Peace non-Presiding as consisting only of those parts of the curriculum which are of direct concern to him. In that case, he should complete the curriculum if his designation is changed to that of Presiding Justice of the Peace.

Initial training is only one aspect of the education of Justices of the Peace. They, no less than other judicial officers need to be kept up to date on current developments but it is here, I think, that one can validly distinguish between the Presiding Justice of the Peace and the Justice of the Peace, non-Presiding. The Associate Chief Judge's office should be responsible for ensuring that copies of all regulations, statutes, judicial decisions and so on that affect Justices of the Peace are routinely circulated to Justices of the Peace. Some will affect only one category of Justice of the Peace, some will affect both. But in itself this is not sufficient. It clearly is desirable - and in my opinion, essential - that periodic seminars and programmes be held, again at government expense, at which current problems and developments can be examined.

These could be arranged on an area basis so that each Justice of the Peace has the opportunity to attend (indeed, is required to attend) perhaps once a year, though it seems to me that there are certain matters such as bail problems or problems under the Provincial Offences Act, where joint programmes for Provincial Court Judges and Presiding Justices of the Peace could be profitably (and economically) arranged.

One could make a modest beginning with something like a two or three day seminar in some of the larger urban areas and, one would hope, expand the programmes so that they are given two or three times a year in various parts of the Province. There is now sufficient expertise among members of the legal profession and the judiciary that the organization and content of such a programme should not prove overly difficult, but, of course, I accept that no little cost will be involved. Again, it seems to me that that is the price we must all be willing to pay for any decent system of justice and that without adequate training and continuing education for Justices of the Peace we cannot have a decent system of justice.

I therefore recommend:

- (1) That all Justices of the Peace immediately after appointment or as soon thereafter as can reasonably be arranged be required to attend a Justice of the Peace training programme.
- (2) That such a programme be geared to theory and substance rather than just "how-to-do-it" matters.
- (3) That in addition to such a programme, all Justices of the Peace be afforded the opportunity to observe others perform their duties in order to become familiar with "how-to-do-it" matters.
- (4) That the contents of such a programme should ideally be the same for all Justices of the Peace but that it may be thought desirable or economically practical to differentiate between Presiding Justices of the Peace and non-Presiding Justices of the Peace.
- (5) That a package of all relevant material be provided for all Justices of the Peace upon appointment.
- (6) That a programme of continuing education to discuss recent developments and current problems be developed for all Justices of the Peace and that consideration be given to making attendance at some part of these compulsory.
- (7) That the cost of all of these be borne by the Province, including a Justice's of the Peace salary and expenses when attending.
- (8) That the responsibility for developing and co-ordinating these programmes rest with the office of the Associate Chief Judge (Coordinator of Justices of the Peace).

5. Full-Time, Part-Time, Classification and Numbers

I turn now to a consideration of the numbers of Justices of the Peace in the Province, their classification and whether they should be full-time or part-time.

Some rational and detailed basis must be found for determining how many Justices of the Peace are needed in each

locality. Hitherto, the method of determining this can best be described as haphazard and dependent, to a large extent, upon each local Judge's perception of need. Some areas simply have too many Justices of the Peace while a few areas may not have enough. This can only be resolved by an individual examination of each area in detail in order to determine, from past experience and projected figures what the workload in each area is likely to be and what sort of workload is involved. It should be possible to estimate with some degree of accuracy the needs of each area for Presiding Justices of the Peace and for Justice of the Peace, non-Presiding.

Let me first of all mention two matters that will have a bearing on this determination. In these days of fairly easy travel and good roads and public transport, one does not have to cleave to the idea of a Justice of the Peace being appointed to serve in one particular location. One community may not be sufficiently large to justify a full-time Justice of the Peace, but there may be other communities within easy reach that, together, could well justify a circuit full-time Justice of the Peace. Since in my view, all Justices of the Peace should be full-time wherever possible, it appears to me that there are many areas where a full-time Justice of the Peace could be appointed to cover two or three locations, either on a regular basis, or to sit as the occasion demanded. While such a scheme would be particularly applicable to the Presiding Justice of the Peace, there may be some areas where even Justices of the Peace non-Presiding could be appointed to cover more than the particular community where they reside. Assuming, of course, that they will be provided with travel and living expenses while away from their own area, I do not think it undue to expect such Justices of the Peace to do some travelling in the course of their duties. It should be a fairly simple matter for the office of the Associate Chief Judge, in consultation with local Judges and court administrators to determine which areas could profit from such a scheme. The result will unquestionably be a greater efficiency and saving in cost.

The other matter concerns the necessity for having Justices of the Peace available 24 hours a day, seven days a week and the convenience in having them so available. As far as the trial of provincial offences are concerned, of course, matters must be arranged to service the maximum convenience of the public consistently with reasonable costs and efficiency. It is probably true to say that in the case of minor offences (particularly traffic offences) night court is infinitely more convenient for most people than day court. If this is so, as I think it is, we must stop thinking in terms of such trial courts being primarily a 10:00 a.m. to 4:00 p.m. proposition and begin

thinking of them as primarily evening operations - not only in the larger urban areas but in any area where the public clearly prefers evening courts. It seems strange to continue to schedule daytime courts routinely when the amount of business in those courts hardly justifies the expense and manpower. In short, it has to be determined just when the courts could be used most efficiently and conveniently for the public and schedule them accordingly - and, I might add, I do not think this criticism is limited to Justices' of the Peace courts but applies to courts of all levels.

Bail hearings are rather different. If an accused is or is likely to be released before trial, it is clearly both just and proper that he be released as soon as possible. Hence, of course, he must be taken before a justice without unreasonable delay within twenty-four hours, or, if a justice is not available within twenty-four hours, as soon as possible. But I do not construe this to mean that the accused has to be taken before the justice immediately. Furthermore, the requirement is that he be taken before a justice, not that the justice be taken or summoned to the accused. It may be very convenient for the police to have the justice come to them to hold bail hearings, but I hardly think it necessary or proper.

I do not like hole-in-the-corner bail hearings - they are conducive to sloppy practices, absence of due gravity and proper consideration and informal agreements. Bail hearings should always be held in a courtroom atmosphere - indeed in courtrooms where possible but if not, then at least in places that preserve the dignity of a courtroom. This should be the place where the justice sits and the accused should be taken before him. I think it is fair to say that efforts are made in this Province to comply with these principles, but I cannot categorize them as any more than efforts. Too many bail hearings are held in totally inappropriate places. I shall discuss this further when I consider "facilities".

If we start with the proposition that bail hearings should be conducted in proper surroundings, "without unreasonable delay" or "as soon as possible" cannot be construed as meaning "immediately". Nor does it mean "when it is convenient for the police". It presupposes that there is in effect a system that will ensure the availability of a Presiding Justice of the Peace to conduct bail hearings according to the circumstances of the locality. This will clearly vary from major urban centres on the one hand to smaller isolated communities on the other. In Toronto, for example, nightly Bail Courts may be entirely "reasonable"; in other areas it may be entirely "reasonable" that the accused may have to wait for his bail

hearing; in other areas, the police may have to transport an accused to a neighbouring town to take him before a justice. Again, what I am suggesting is that there is a need to determine for each area in the Province exactly what the requirements for a Presiding Justice of the Peace to conduct Bail Hearings are and how best and most efficiently to meet those requirements.

There are somewhat similar problems with the so-called "signing Justice of the Peace" or, as I would propose to designate them, the Justice of the Peace non-Presiding. I suppose there is the odd exceptional case of real extreme urgency where the police must get a search warrant at once or must have process issued immediately, but in fact, in the vast majority of cases it is not a question of urgency but a question of convenience. For example, a police officer presents a search warrant application at a Justice's home at 11:00 p.m. on the grounds that it is urgent. It appears however, that the "urgency" is that the next day is his day off and he cannot make the application during normal working hours and thus expects the justice to deal with it on the spot. In my view, the justice would be quite entitled to refuse to entertain the application. While it is part of any Justice's of the Peace duties to consider applications and informations at any hour in cases of true and exceptional emergency, it seems to me an archaic concept and inconsistent with the dignity of his office to expect him to comply with the mere conveniences of either the police or the public.

If, then, the role of the Justice of the Peace is put in its proper context, if more attention is given to the actual needs of each area, and stricter control maintained over the appointment of Justices of the Peace, if more use is made of "circuit Justices of the Peace" and the concept of Justices of the Peace servicing a wider area than a single local community, it would become quite apparent that we simply do not need as many Justices of the Peace as we have at present - some 750 or so of which some 600 are active to some degree or other. It would be possible to appoint without too much difficulty, more full-time Justices of the Peace than we now have. Indeed, I would like to see us move towards the situation where all Justices of the Peace are full-time, though I recognize that this will not be possible for some time and may never be possible in remote areas and native communities. Nevertheless, in principle, in keeping with the dignity and importance of his office, this remains a desirable objective.

The cost, given that there will be need for very many fewer part-time Justices of the Peace, will be higher than at present but will not be exorbitant or intolerable. It will lead

to much greater uniformity across the province, a raising of the standards and an elevation in the dignity of the office - all of which seem to me not only desirable but essential. One of the first tasks of the Associate Chief Judge (Coordinator of Justices of the Peace) should be to study the needs of each area (of course in consultation with those on the spot) to determine the best and most effective way of making use of a full-time Justice of the Peace or full-time Justices of the Peace.

Assuming that it will not be possible for all Justices of the Peace to be appointed on a full-time basis - and certainly it will not be possible in any case to achieve this immediately - I turn now to the position of those Justices of the Peace who are not full-time. For reasons I have discussed in the previous Chapter, I utterly reject the concept of the piecework fee Justice of the Peace and I do not think that merely replacing that system by an hourly or daily fee geared to the amount of actual time spent will solve the real problem. The only solution, in my opinion, is for Justices of the Peace who are not full-time Justices of the Peace to be appointed on a part-time basis. As I have suggested for simplicity in accounting and classification, part-time Justices of the Peace should fall into one of three categories, viz. quarter-time, half-time or three-quarter time and be paid a quarter, half or three-quarters of the salary of a full-time Presiding or non-Presiding Justice of the Peace at their level. I see no insuperable difficulty in working out which localities and areas would need which category of Justice of the Peace. Given my observations about the use of "circuit Justices of the Peace" and "area" Justices of the Peace it clearly would be a matter of priority to determine this in order to eradicate as soon as possible and once and for all the iniquitous fee-system we have at present. I accept that there may, even under this scheme, be some areas where there is not enough work for even a quarter-time Justice of the Peace, yet where the presence of a Justice of the Peace is essential. I can only repeat and stress my view that the administration of justice in this province is too important to allow principle to be sacrificed for perceived efficiency and that in those areas the taxpayer must bear the cost of those Justices of the Peace working somewhat less than his salary warrants in order that justice be as uniform in Ontario as possible.

The terms and conditions of work, when and where each Justice of the Peace will be expected to perform his duties must be clearly defined. I can only give examples of what I mean but in, for example, the Toronto area, the abolition of fee or "per-diem" Justices of the Peace and, I hope, the "administrative Justices of the Peace" will mean that more full-time Justices of

the Peace will be required. Some may have a standard 9 to 5 duty schedule; some may have a 5 to midnight schedule; some may have a 9 to 5 schedule sometimes and an evening schedule; some may have a midnight to morning schedule and so on. I have no doubt that the Associate Chief Judge's office (or the person to whom he delegates) could work out a scheme. In other areas - say taking in 3 or 4 smaller communities, - there would be the undertaking to be available at specific times and places. I do not suppose the terms and conditions have to be so rigid that there cannot be flexibility to meet conditions as they arise and I have no doubt whatsoever that all Justices of the Peace would respond in the best tradition of judicial office to ensure the smooth running of the system.

I therefore recommend:

- (1) That all Justices of the Peace be appointed on a full-time basis wherever possible and that less than full-time justices be appointed only where the circumstances make this necessary.
- (2) That to facilitate this, where appropriate, justices may be appointed to cover a designated "circuit" or to service particular areas rather than only local communities.
- (3) That those justices not appointed full-time should be in receipt of a salary proportionate to the time devoted to Justice of the Peace duties and be classified as quarter, half or three-quarter time as the occasion demands.
- (4) That an item of priority be the determination, in accordance with these principles, of how many of what category Justices of the Peace are required for all areas of the Province in order to implement these proposals.
- (5) That considerably more attention be given to the orderly and efficient scheduling of courts at times most convenient for the public, leading perhaps to the result that evening or night court for provincial offences will be the norm rather than the exception.
- (6) That, accordingly, each Justice of the Peace, on accepting his appointment clearly undertakes to perform those duties at those times and places that will best achieve these ends.

6. Status and Security

Some of what I am about to say applies with equal or greater force to members of the Provincial Court judiciary, but my terms of reference are limited to Justices of the Peace.

It is utterly monstrous and totally indefensible that any judicial officer - even at the lowest level - should be considered an employee of the Government. Anyone in a decision-making position - whether it be the resolution of disputes, the hearing of judicial interim release proceedings, or the determination of whether to issue arrest warrants or criminal process - cannot, either expressly or impliedly, be considered as a civil servant or as a public servant in the sense that that term is used in Ontario. Of course, all judges are "public servants" but in this Province the designation "public servant" has a specific meaning within The Public Service Act and many, if not most, of the provisions of that Act are inconsistent with any concept of judicial office in a democratic society as we understand it. I would have hoped that this essential principle is so obvious that it did not need even stating, much less belabouring but this is not the case.

It is assumed by many that because Justices of the Peace are appointed by Order-in-Council on the recommendation of the Attorney General and paid from the resources of the Ministry of the Attorney General, they are therefore somehow employees of the Attorney General's department or the Government. The Attorney General in this Province has many roles that in other jurisdictions may belong to different people. In his capacity as Minister in charge of provincial judicial appointments his role is more akin to that of the Lord Chancellor than that of an elected member of the Cabinet and Legislature. It is true that he "controls" appointments in the first place and pays the appointee (and ultimately should the occasion arise, as I shall later discuss, fires and disciplines them), but if a designation must be given to such appointees, they are the Queen's servants, not civil servants and not public servants. The political role of the Attorney General has nothing whatever to do with his role as the Queen's Lord Chancellor. Unfortunately, to my mind, this proposition is not clear-cut in Ontario - the Attorney General as we know him, has taken on some of the functions of the Lord Chancellor, but not others, some of the functions of the Home Secretary but not others, some of the functions of the Queen's Attorney but not others. Nevertheless, clear-cut or not, it is essential to determine when the Attorney General is acting in one capacity and when in another and in my opinion, the power of appointment (through, of course, an Order-in-Council) does not necessitate an employer/employee relationship.

Of course, at the moment, judicial officers simply do not fit into the present categories of our bureaucracy, but the bureaucracy must change not the status of our judicial officers. Unless this point is conceded, the way lies open to the destruction of judicial independence and once that happens we have destroyed the very basis of our society.

It is too late now for any other solution but a new Justices of the Peace Act that unequivocally sets out those principles. These are that all Justices of the Peace shall enjoy independence of judicial action (that is, freedom from directions or control in the sense I have discussed above); security of office (subject, as I shall discuss, to dismissal after due process for cause); security of remuneration (according to the terms of their appointment) and the right not to have salary withheld; and protection in the case of unavoidable disability and upon retirement.

Translating these principles into concrete provisions is not difficult. We are familiar enough with the concept of judicial independence not to have to do more than set out the proposition.

Security of office means freedom from arbitrary dismissal or threat of dismissal, which is not now safeguarded in the Justices of the Peace Act in spite of the creation of the Justice of the Peace Review Council. The principle of retirement of judges is now so firmly established that it seems very strange that Justices of the Peace are the only ones that retain their appointment for life. In my view, it is not inconsistent with security of office to establish a mandatory retirement age. I have no particular views on exactly when that should be except that I think 60 is too young and 80 too old so I would propose that a compulsory retirement age for Justices of Peace be set at 70. In the case of the so-called "administrative Justices of the Peace", I have already expressed the view that they should cease to be appointed at all, but I accept the proposition that in some instances they may be necessary or at least desirable. Apart from the fact that I am uneasy about a person wearing two hats - one as a civil servant and one as a judicial officer even if his appointment is only as a Justice of the Peace non-Presiding, I see absolutely nothing inconsistent with his security qua judicial officer in limiting his appointment as a Justice of the Peace only while he holds his employment as a court administrator.

Subject, then, to these two points - viz. a retirement age and a limited appointment for administrative offices, - a Justice of the Peace, whether Presiding or not, must be secure

and feel secure. He should be free from any action or express or implied threats of action that may jeopardize that security, and that means freedom from being dismissed or in any way disciplined save under two conditions, namely for cause and only after due process.

Unless "cause" is specified with some particularity there is always the danger that justices may be threatened with disciplinary proceedings for some vague and undetermined matter that may threaten their sense of security quite improperly. Knowing in advance what "cause" means is, I should have thought, one of the basic principles of due process. I would suggest something along the lines of,

- (a) Wilful misbehaviour rendering him unfit for judicial office;
- (b) Wilful neglect of his duties;
- (c) Gross incompetence in the performance of his office; and
- (d) Continued inability to perform his duties.

There is a lot of leeway even under that definition but I find it acceptable for two reasons. First, at least all Justices of the Peace will know the sort of conduct that might involve them in disciplinary proceedings even if there may be some dispute as to where mediocre performance ends and gross incompetence begins. Second, in view of the procedure I am about to propose, the onus will be on those seeking the disciplinary measures to prove the cause within the limits of its definition. It may be that in the case of part-time Justices of the Peace, a further "cause" should be the acceptance or continuance of employment inconsistent with holding part-time judicial office. There will be some problem with definition and perhaps in the clearest cases inconsistent employment could be considered "wilful misbehaviour". I would incline to the view that guidelines should be established outlining the type of employment or office considered inconsistent with judicial office and that a term of the appointment of part-time Justices of the Peace be an undertaking not to engage in that sort of activity.

If, therefore, Justices of the Peace can be removed, what procedure guarantees their security? The answer must lie in a system in which a justice cannot be removed (save for the specified cause) unless some due process machinery has been gone through. This must be enacted and not left implied as at present. The concept of a Judicial Review Council has proven to be very effective and I see no reason why a Justice of the Peace Review Council could not be equally as effective.

Firstly, the composition of the Justice of the Peace Review Council. The members of the present council are decidedly not those recommended by the Law Reform Commission and I assume this was a deliberate decision on someone's part, but, in my view, that decision was misguided. This is not a body of schoolmasters disciplining recalcitrant children. It is a body of judicial officers sitting in judgment on another judicial officer.

In my view, it should consist of the Associate Chief Judge (Co-ordinating Justice of the Peace) as Chairman, one member of the Provincial Court (Criminal Division) judiciary, one member of the Provincial Court (Family Division) judiciary and two full-time Presiding Justices of the Peace.

Any complaint would be received by the office of the Associate Chief Judge and investigated. I presume that in many cases (such as groundless complaints by disgruntled citizens or police officers) the complaint will be dismissed and go no further. It will only be in the exceptional case that the Associate Chief Judge will decide that "a case has been made out", and the Justice of the Peace notified. From then on, all those steps which we call "due process" must follow - the right to counsel, to put in a defence, to be informed of reasons and so on.

Only if the Council finds that the cause has been proved should it inform the Attorney General, and the Attorney General have the right to initiate the revocation of the justice's Commission. It seems to me that in these matters, there is only room for one of two decisions - either the cause has been proved and the justice should be dismissed, or it has not and he cannot be dismissed. Lesser actions like suspension for a year, simply are not applicable to judicial officers, save in one case. Where it is found that a justice's inability to perform his duties arises from medical causes, it may be appropriate to suspend him from duty during the continuance of that disability. I assume that in most cases, if this arose, proceedings would not be necessary, and the justice himself would agree that he was unable to perform his duties, but occasions might arise when the question would have to be settled as to whether he was or was not able. In either case, whether the justice agrees or whether the Council so finds, during the period when he is absent or is suspended, the justice must be entitled to disability payments.

There may also arise the possibility of the "demotion" of a Presiding Justice of the Peace to a Justice of the Peace non-Presiding. I find it difficult to imagine when this would

apply, but I suppose one could conceivably have a case where there is "cause" why a Justice of the Peace should no longer preside, but the "cause" is not sufficient to remove his Commission as a Justice of the Peace non-Presiding. I myself would think that if the "cause" is sufficient to remove him in one function, it would be sufficient to remove him in the other, but I would have no strong objection also having the power to recommend such "demotion" for cause and, of course, after due process.

There is one other matter of discipline to which I should like to refer to here, though it actually concerns salaries. If there is to be any sort of salary scale, increases in salary should not be dependent upon anyone else's good will, but I accept the view that on a rare occasion, a salary increase may not be merited. I can only think of two instances - one where the justice has been absent on sick leave for more than six months or so, and the other where he has failed, without justification, to attend the continuing education programmes that I have proposed. A justice who has not actually worked for a substantial portion of the preceding year, may be seen not to be entitled to an increase, and a justice wilfully refusing to attend seminars but who in other respects is performing his duties properly, may also properly have an increase withheld. But this is a potentially dangerous sanction and, again I would propose, that this step only be taken after a review by the Justices of the Peace Review Council and only after due process.

It will be seen that I just cannot accept the principle of suspending salary for Justices of the Peace who are under investigation by the Review Council. This step may be perfectly permissible in the case of employees and civil servants, but it is a gross interference with judicial independence as I view it. As I have stated, the continuing of a Justices of the Peace salary, even if "cause" is subsequently found and the Justices of the Peace Commission is revoked, is a small price to pay for maintaining such a vital principle. Suspension from duty with pay pending the outcome of the inquiry is a different matter. I appreciate that, depending on the nature of the accusation, a justice may not be able to function properly or effectively while under investigation. Much, I think would depend upon the nature of the accusation and the circumstances but it is a power that the Council should have even if it is exercised only rarely.

Real security (which is the natural concomitant of judicial independence) not only consists of security of position and of salary, but also protection in the case of disability and a reasonable pension on retirement. I am no actuary and my

knowledge about long-term disability insurance and various pension schemes is virtually non-existent, but I am persuaded that the present system is quite inadequate and unacceptable. However, it is accomplished, salaried Justices of the Peace (and I hope that this will mean all Justices of the Peace, full or part-time) must have the right to disability payments if they are, through illness, forced to be absent from their duties for any protracted length of time beyond any shorter period of sickness during which their salaries are, of course, paid, and the right to a pension proportionate to their salaries and length of service. This must be theirs as of right and not dependent upon anyone's favour or good graces and, in my opinion, should form part of the Justices of the Peace Act ensuring categorically that the provisions of the Civil Service Act and the Public Service Act do not apply to Justices of the Peace.

I therefore, recommend:

- (1) That a mandatory retirement age of 70 years be established for all Justices of the Peace whether Presiding or non-Presiding;
- (2) That appointments of administrators as Justices of the Peace, non-Presiding terminate when their civil service appointment terminates;
- (3) That, subject to (1) and (2) all Justices of the Peace enjoy security of appointment with the right not to be dismissed save for cause after due process proceedings;
- (4) That "cause" be specified as clearly as possible and the steps required for "due process" be given statutory effect;
- (5) That the hearing of the cause shall be by the Justices of the Peace Review Council which shall report its findings to the Attorney General;
- (6) That the Justices of the Peace Review Council be composed of:
 - (a) The Associate Chief Judge (Coordinator of Justices of the Peace);
 - (b) One Provincial Court Judge (Criminal Division);
 - (c) One Provincial Court Judge (Family Division);
 - (d) Two full-time Presiding Justices of the Peace;

- (7) That the Justice of the Peace Review Council have the power to recommend the withholding of a salary increase, for cause after a due process hearing, in appropriate cases;
- (8) That there be no power to withhold the salary of a Justice of the Peace whose conduct is under investigation by the Justice of the Peace Review Council;
- (9) That in appropriate cases, the Justices of the Peace Review Council may authorize the Associate Chief Judge (Coordinator of Justices of the Peace) to suspend from duty, with pay, any Justice of the Peace whose conduct is under review by the Justice of the Peace Review Council;
- (10) That an acceptable scheme of long-term disability insurance be established to provide reasonable payments to any Justice of the Peace whose long-term inability to perform his duties arises from medical causes;
- (11) That an acceptable retirement pension scheme be clearly adopted for all salaried Justices of the Peace, in accordance with current generally accepted principles; and
- (12) That the Justices of the Peace Act be rewritten or amended to incorporate in statutory form these proposals.

7. Remuneration

In the previous Chapter, I attempted to assess, without preconceived notions, both the proper method of remuneration for Justices of the Peace and, in the light of current conditions, the proper level of remuneration. I would be the first to admit that the task is difficult because I think we have to make a fresh start. Past experience is not very useful since hitherto there has not been a proper understanding of the function and role of the Justice of the Peace in the criminal justice system. Some help can be got from considering the salaries and qualifications of others involved in the system from secretaries and clerks on the one hand to Supreme Court Justices on the other. Presumably Justices of the Peace are somewhere between these two extremes.

It has been urged upon me that the salary of at least a full-time Presiding Justice of the Peace should be geared in some proportion to that of a Provincial Court Judge - at 60, 70 or 80 percent of the latter's salary. Such a proposal is helpful, but I do not think it should be determinative. On the one hand, it is true that a Justice of the Peace does perform many of the functions formerly performed by Provincial Court Judges and, especially since the introduction of the Provincial Offences Act, a "sitting Justice of the Peace" has been given jurisdiction to try many offences once tried only by a Provincial Court Judge and in the course of time may be given even wider jurisdiction. Thus, it is said, since they are doing the work formerly done by Provincial Court Judges, Justices of the Peace should at least receive a salary that approximates that of a Judge.

On the other hand, with Judges we are dealing with persons who have spent many years in University and in Law School preparing for the Bar, who have spent a number of years (sometimes several years) in practice and who, in most cases, even now earn somewhat less than they could have earned had they stayed in practice. In the case of Justices of the Peace we are dealing with people who have, I would hope, at least only a Grade XII education, who do not have the legal experience or training of a Judge and who do not in all probability have the alternatives open to them as are open to a Judge. One thing I would not use as a comparison is their relative "importance". They are both equally, if differently, important in the criminal justice system.

From a purely objective point of view, I conclude that the comparison breaks down and that the salary of a Provincial Court Judge should not be used as a determinative yardstick. Nevertheless it is one point on the scale of the salaries of all those involved in the administration of criminal justice - and the point is \$62,000 a year. Police officers represent another point - at about \$27,500 for an officer of some, but not particularly lengthy, experience. Court administrators represent another - at about \$22,000 for an average salary. Whatever precise conclusion one reaches, it seems to me beyond question that the full-time sitting Justice of the Peace (or, as I propose, the Presiding Justice of the Peace) receives inadequate remuneration.

Before discussing specifics, let me repeat that if my proposals set out above are adopted, we would see the abolition of all incidental, per diem, overtime and the like fees. Justices of the Peace would be appointed on the understanding that the terms of his appointment will require him to be

available at the times and places now covered by the use of overtime, per diem and casual services. Each Justice of the Peace would undertake his duties so that all of these contingencies would be taken care of by full-time Presiding Justices of the Peace or full-time or part-time Justices of the Peace, non-Presiding. Thus, when I refer to the salary of a Justice of the Peace I mean his actual received salary. "Extras" would be a thing of the past.

At the top end of the scale, we would be dealing with a person with at least Grade XII education, who has been a Presiding Justice of the Peace for fifteen years or more, who has developed considerable expertise in his field, who has kept up-to-date on recent developments and who has made this his career. Looking at the matter as objectively as I can, and trying to place him in his proper (and, I hope, enhanced) position in the criminal justice system, it seems to me that such a person should really be making something in the region of \$45,000 a year, by current standards.

At the other end of the scale, we have a person who has Grade XII education at a minimum, but who comes to his position with no experience as a Presiding Justice of the Peace (he may have had experience as a non-Presiding Justice of the Peace or experience in some other capacity in the system, but let us assume that he has no experience at all). He has been examined and found to be qualified - that is to have some reasonable maturity, the intellectual capacity that is necessary and the character that is required. In all probability he will be at least 30 years old, and thus, even if not experienced as a Justice, will have had some experience with life in general. Again subject to my protestations of diffidence, it seems to me that a starting salary under these conditions of \$25,000 per annum is quite reasonable, by current standards.

Thus I arrive at two extremes ranging from \$25,000 to \$45,000. As I discussed in the previous Chapter, it seems to me that the scale should not be so compressed as it is at the moment. I do not think one can reasonably expect to move from \$25,000 to \$45,000 in a matter of five or six years. I think a 15 year span more adequately reflects the increase in knowledge, maturity and experience that should be the justification for the progress.

Of course, in appropriate cases, Justices of the Peace should be able to be appointed at any level within the salary scale, to reflect increased qualifications over and above those required for the new totally inexperienced appointee. It also seems to me that in those cases where the Associate Chief Judge

(Coordinator of Justices of the Peace) has determined that it would be expedient to have a local supervisory or senior Justice of the Peace to assist in the administrative work on the local level, it would also be appropriate that such a person be paid a suitable bonus - perhaps two or three thousand dollars over the scale.

This seems to me both adequate and reasonable for Presiding Justices of the Peace and properly reflects their importance in the judicial system. In the case of Justices of the Peace, non-Presiding, I must stress that I consider them, too, to be an important and integral part of the criminal law process. It is true that they do not sit in an adjudicative capacity, but they do act in a decision-making capacity; they must consider applications and informations and make decisions. In my view, their status and prestige must also be recognized and thus they should not be treated too differently from Presiding Justices of the Peace. At the same time, it is silly to pretend that they are in all respects the same as Presiding Justices of the Peace or should have the same level of salary. Unless, however, it bears some reasonable approximation to it, there is the ever-present danger of denigrating their function.

Again, I would envisage a 15 year scale on the same sort of conditions. The present practice of pegging the salary of a non-sitting Justice of the Peace of three years standing at one grade below that of a sitting Justice of the Peace at the beginning of scale appeals to me as putting the non-sitting Justice of the Peace at about his right position. If the scale of the Presiding Justices of the Peace works out from \$25,000 to \$45,000 in 15 years, it means an annual increase of approximately \$1,500. It seems to me that it would be reasonable for the salaries of Justices of the Peace, non-Presiding, to be pegged at \$6,000 less than that of Presiding Justices of the Peace, or a scale ranging from \$19,000 to \$39,000. This may, indeed, work out at less than what some are now making at the lower end of the scale, but considerably more than is being made at the upper end of the scale.

I have already set out my reasons for utterly rejecting the present piece-work fee system for Justices of the Peace. As I have proposed, I would hope that the present structure could be reorganized so that many more full-time Justices of the Peace could be appointed (both Presiding and non-Presiding) and consequently many fewer part-time Justices of the Peace. Indeed one could look forward to the time when there were no part-time Justices of the Peace but I think that is a long way in the future. Meanwhile, there will have to be part-time Justices of the Peace and in my view, the only solution to the problem of

how they should be paid is to adopt a salary system appropriate to each of them. Since I reject a piece-work fee system, and, for reasons discussed, also reject a per diem fee system, I see no solution but a part-time salary system.

I do not think it need be unnecessarily complicated. I do not think we have yet realized that fee Justices of the Peace are, by and large, overwhelmingly proud of their title, dedicated to their task and eager to maintain the best traditions of their profession. I am sure it will not be an easy task or one that can be accomplished overnight but I have no doubt that, with a little work and some statistical and administrative assistance, it will be possible to classify all part-time Justices of the Peace into one of three categories of quarter-time, half-time or three-quarter time Justices of the Peace (either Presiding or non-Presiding) according to the workloads of each area, the local needs and conditions and so forth. I do not know of any Justice of the Peace who would worry if his quarter-time turned out to be quarter-time and a little bit extra, or half-time a bit more, nor do I think we should worry if it turned out to be a little less than quarter-time or a little less than half-time. In fact, what one should be looking for, is the average amount of time expected to be devoted to Justice of the Peace duties. Certainly, if it appears subsequently that the proportion of time has been greatly overrated or greatly underestimated, it would be a simple matter to readjust the classification. All part-time Justices of the Peace should then receive a quarter, half or three-quarters of the appropriate salary for a full-time Justice of the Peace, either Presiding or non-Presiding, with an equivalent number of years experience, and the proportionate promotions each year, the proportionate pension and disability and other fringe benefits. This, in my view, is the only way to guarantee the part-time Justice of the Peace all the independence and freedom from external pressure that I have been at pains to guarantee for the full-time Justice of the Peace. Again, the terms of his appointment would have to make clear what his duties were and when and where he would be expected to perform them. Some, perhaps would be required part-time weekly; some perhaps full-time for part of the year; some perhaps full-time for one week a month. It seems to me that the local judge and court administrator would be the very persons who could assist in the determination of what each area requires - area, again being used, not necessarily in the sense of a single local community, but in a wider sense of servicing perhaps 2 or 3 communities on a travelling basis.

Similarly, it is essential that all part-time Justices of the Peace receive exactly the same protection in the way of

security of office and judicial independence that a full-time Justice of the Peace receives. Needless to say, however, the terms of appointment of any part-time Justice of the Peace, would have to make it clear (certainly in the initial period) that the category of his appointment (i.e. quarter, half or three-quarter time) and the times when he would be required to serve (i.e. evenings, or so many days a week, or how many months a year and so on) would be subject to re-negotiation as the exigencies demand and the requirements of each particular area necessitate. These purely administrative matters (so long as they are limited to administrative matters and are not used as excuses for interference in substantive matters) do not, in my view, interfere with a part-time Justices' of the Peace judicial freedom and independence.

I therefore recommend:

- (1) That all full-time Presiding Justices of the Peace be paid on a salary scale ranging from \$25,000 to \$45,000 over a fifteen year period, with an extra bonus of some amount for those designated by the Associate Chief Judge (Coordinator of Justices of the Peace) to be "supervising" or "senior" Justices of the Peace with administrative responsibility;
- (2) That all full-time Justices of the Peace, non-Presiding be paid on a salary scale ranging from \$19,000 to \$39,000 over a fifteen year period;
- (3) That all part-time Justices of the Peace be paid a salary proportionate to the amount of time they devote to Justice of the Peace duties as would be received by a full-time Justice of the Peace of the category and length of service;
- (4) That all part-time Justices of the Peace be appointed on a quarter, half or three-quarter time basis as the local conditions demand;
- (5) That wherever possible, all Justices of the Peace be appointed on a full-time basis;
- (6) That the terms of appointment of all Justices of the Peace clearly specify the conditions of the appointment as to when and where each Justice of the Peace will be required to be on duty;

- (7) That all fees, bonuses, retainers and extras whatsoever be abolished, and replaced by a cohesive and comprehensive system ensuring the availability of Justices of the Peace when and where required without the necessity of resorting to such unjudicial practices.
- (8) That all part-time Justices of the Peace enjoy the same security and freedom from arbitrary dismissal as full-time Justices of the Peace, save only that the terms and conditions of their appointment may be subject to change as the circumstances dictate in individual localities.

8. Direction, Advice and Control

I hope it is clear from what I have stated previously what I mean by Direction, Advice and Control.

"Direction" I use in the sense of assignment as to who sits or goes where and when and performs what function. "Advice" I use in the sense of advising Justices of the Peace on matters of law and practice in assisting them in understanding legal problems, in applying the law and in adopting certain practices. "Control" I use in the sense of compelling Justices of the Peace to reach particular decisions or apply the law in a particular way or adopt a particular practice.

(a) Direction

I have already recommended the establishment of an office of Associate Chief Judge (Coordinator of Justices of the Peace) to undertake the direction of Justices of the Peace in this province, to have the ultimate responsibility for the assignment of Justices of the Peace. He should have the authority to delegate this duty to others - to the local Provincial Court Judge or to a "Supervisory" Justice of the Peace when the circumstances warrant it, but the ultimate duty and responsibility should remain his. I shall have to say more about the nature and organization of the office of Associate Chief Judge in the next section.

(b) Advice

I have already outlined the present rather unsatisfactory state of affairs. There is really no organized method whereby a Justice of the Peace can receive the advice which, from time to time, he both needs and is entitled to expect.

I would not like to abolish the present system whereby a Justice of the Peace can approach the local (senior) Provincial Court Judge and the Crown Attorney for advice. As far as the Provincial Court Judge is concerned, I repeat what I have said before, namely that it is not his primary function to be giving legal advice to others and there may be occasions when, in any case, he will have to decline the giving of advice if the matter is likely to come to him on appeal. But, as an informal procedure, I see that there may be cases when a Provincial Court Judge would be willing to assist a Justice of the Peace and may do so without impropriety. Much will depend upon the individual judge and Justice of the Peace, the particular circumstances and whether there is any urgency.

Similarly, as I have stated, I do not see any impropriety in a Crown Attorney (in his capacity as a local Minister of Justice) giving advice on legal matters to a Justice of the Peace who requests it. I do not think a Crown Attorney should offer unsolicited advice lest he be seen to be attempting to interfere with the independence of the Justice of the Peace, nor do I think he should give advice on other than legal matters lest he be seen to be attempting to influence the Justice of the Peace improperly. But, subject to those reservations, Crown Attorneys are, for the most part, only too willing to give what assistance they can.

Of course, conditions vary from place to place. Occasionally the Provincial Court Judge is not available or too busy himself to offer advice; in some places, there is no Crown Attorney immediately available and often a Justice of the Peace may be reluctant to approach a stranger or comparative stranger with some problem. While these two avenues exist, therefore, and should continue to exist, I think they are far from sufficient.

In my opinion, the office of the Associate Chief Judge (Coordinator of Justices of the Peace) should also be available for advice to all Justices of the Peace. I have already recommended that he be in charge of organizing the training and continuing education of Justices of the Peace and of ensuring that they be kept up-to-date on recent decisions and relevant material. It seems to me that it is also appropriate that he be the one to whom Justices of the Peace can turn to for advice and indeed be encouraged to turn to for advice so that they do not feel that they are intruding but, on the contrary, that they are expected to do so. I imagine that in many cases, a letter seeking advice and a written reply would be appropriate; perhaps the problem would be of sufficient interest and importance that it should be circulated to all Justices of the Peace. In cases

of emergency, perhaps a telephone call or a personal visit would be most desirable. In any case, all Justices of the Peace should know of this service and be encouraged to use it.

(c) Control

Advice is one thing but control is a totally different matter. Having received advice, no Justice of the Peace should feel himself bound to follow it. I imagine that in most cases, of course, he will follow the advice, but, as all lawyers know, advice sometimes only reinforces one's opinion of the correctness of the contrary.

Control is the requiring of a Justice of the Peace to reach a particular decision, failure to do so being a breach of his duty. I have already stated categorically that in my opinion, the only control of any Justice of the Peace in this sense should be within established legal principles. A superior court can control ("direct" when used in this sense) a lower court (including a Justice of the Peace) in requiring it to reach a particular decision or apply a particular law or rule of practice. Parliament can, of course, control Justices of the Peace by Act of Parliament. All lower courts are legally bound to follow the precedents of decided cases. These are all legitimate and recognized methods of controlling Justices of the Peace, and are no different for them from any other judicial officers or courts.

In the previous Chapter I discussed the practical difficulties that we have inadvertently run into in our attempts to control Justices of the Peace within existing boundaries. While remedies against decisions that are considered wrong or against procedural matters that are considered improper or misguided do exist, they tend to be cumbersome and not very practical. Unless there is some method of legally determining the correctness of certain decisions or procedures, Justices of the Peace themselves are left with no authoritative ruling on which course they should be adopting. No judicial officer wishes to be in that position. In fact one may and does have the situation where some Justices of the Peace are following one procedure and others a different one; some are applying the law one way and others a different way. Yet the occasion to get an authoritative ruling (by way of appeal or prerogative remedy) never arises because there is no one to take the steps necessary to bring the matter before a competent judicial body. In my view, a simple but effective method would be the establishment of a Divisional Court of the Provincial Court with power to issue directions to Justices of the Peace on matters of law and procedure. I suggest Divisional Court because the name is

already known in jurisprudence but perhaps Practice Court or Rules Court would be equally acceptable.

Such a Court should consist of three judges (such as the two Chief Judges and one other Provincial Court Judge). It would sit judicially and issue its Directions en banc on any matter of law or procedure affecting the duties and powers of Justices of the Peace. It could act either on its own motion or upon application by the Associate Chief Judge (Coordinator of Justices of the Peace). It would have the power to hear argument if necessary and would doubtless consult with appropriate persons before considering its decision. Its directives would be binding upon all Justices of the Peace though, of course, should the matter be considered by a superior court and a different conclusion reached, the superior court judgment would prevail.

I can envisage many situations when such a Court would be desirable. It is, at the moment, simply not authoritatively decided, for example, whether bail hearings have to be "in public" or not; whether the scrutiny of sureties may properly be done in places such as police stations or detention centres; whether such scrutiny has to be done in the presence of the accused and, if so, what "presence" means.

I should like, at this stage, though it may not be the most appropriate place to do so, to consider item (8) of my terms of reference viz. to inquire into and report upon a method of structuring, guiding and controlling the discretion exercised by Justices of the Peace in matters such as issue of process and subpoenas and the approval of sureties and the release of accused persons. I shall consider the physical problems when I deal with "facilities" but I must say something about the substantive issues.

It is clear from the rest of this report, that I do not subscribe to any view that would structure, guide or control any exercise of discretion by any Justice of the Peace in any of his functions, if by that is meant the interference with his judicial decision-making. If a Justice of the Peace is given a duty to perform, then it is his duty and no one else's. So long as the Justice of the Peace is qualified and trained, so long as he understands his functions and so long as he proceeds upon correct principles, whenever he has a decision to make, that decision must be his and his alone. This seems to me to dispose immediately of any question of "structuring, guiding or controlling the discretion exercised by Justices of the Peace in matters such as issue of process and subpoenas".

Unfortunately, in the area of "approval of sureties and the release of accused persons", the matter is not quite so clear cut, and raises a problem adverted to in item (7) of the terms of reference, namely the relationship between the Justices of the Peace and the Crown Attorneys. Section 12 of the Crown Attorneys Act provides:

...[E]very Crown attorney shall...

- (j) where a prisoner is in custody charged with or convicted of an offence and an application is made for bail, inquire into the facts and circumstances and satisfy himself as to the sufficiency of the surety or sureties offered, and examine and approve of the bail bonds where bail is ordered.

It has been indicated that all bail of \$5,000 or more should be referred to the Crown Attorney for his approval of the sureties. In fact, there is some doubt as to the validity of this provision in view of the fact that the Criminal Code imposes the duty of determining the amount of bail on the Justices of the Peace, though it does not specifically deal with the question of who should approve proffered sureties. I myself should have thought that the acceptability of sureties was as much part of a judicial process as the determination of whether to release the accused in the first place, and, as such, that it was entirely in the hands of the justice. But there is a case for arguing that the scrutiny of sureties is merely an administrative function and that the supervision by the Crown Attorney does not interfere with any judicial function of the justice. None of the more recent cases (Chisholm (1974) 18 C.C.C. (2d) 509; Morenstein (1977) 40 C.C.C. (2d) 131; Martin (1980) 57 C.C.C. (2d) 31) is as definitive as one might wish, but the weight of authority seems to tend towards that view that Sec. 12(j) does not give the Crown Attorney authority to make the final determination. In any case, it is my view that Sec. 12(j) should be repealed. Judicial interim release cannot be split up into distinct packages and labelled "judicial" or "administrative". It is all the one process of deciding whether and upon what conditions an accused should be released.

I recommend therefore:

- (1) That assignment of duties of Justices of the Peace be the responsibility of the Associate Chief Judge (Coordinator of Justices of the Peace);
- (2) That the Associate Chief Judge (Coordinator of Justices of the Peace) establish a process whereby Justices of the Peace may receive advice and

assistance on matter of law and practice, but without prejudice to their seeking informal assistance from the local (senior) Provincial Court Judge or Crown Attorney; and

- (3) That a court be established (by whatever name is considered most appropriate) with the power to issue practice directions that will be binding on all Justices of the Peace on any matter of law or procedure within the scope of their duties and powers.

9. The Office of the Associate Chief Judge
(Coordinator of Justices of the Peace)

It will by now be apparent that I propose an office considerably more structured than at present for the general supervision of Justices of the Peace. Indeed, I have deliberately avoided using the title Supervisor of Justices of the Peace or Director of Justices of the Peace since I wanted to stress my view that no one "supervises" or "directs" them in any sense that impinges on their judicial independence. I must admit that I do not find "Coordinator of Justices of the Peace" very elegant or properly descriptive. "Chief Justice of the Peace" is actually the most meaningful, but I do think he should be someone with the rank and function of an Associate Chief Judge of the Provincial Court and the title Associate Chief Judge, Chief Justice of the Peace seems rather absurd. As a result, I have settled for Associate Chief Judge (Co-ordinator of Justices of the Peace) but I am not particularly wedded to that title.

His duties as I see them would be the assignment and organization of all Justices of the Peace in the Province on a rational and efficient basis; the training and continuing education of Justices of the Peace, including the organization of all training programmes and educational seminars; the circulating of all memoranda, recent decisions and matters of interest to all Justices of the Peace either generally or on an individual basis; the initiation of requests for Directions on all doubtful matters of law or practice relating to the duties of Justices of the Peace from the Divisional Court of the Provincial Court (or whatever title is adopted); and presiding over the Justices of the Peace Review Council in all its functions as to the appointment of all Justices of the Peace and termination of appointment proceedings or recommendations as to withholding pay increases or as to long-term disability leave.

No one could expect such a scheme to operate effectively without necessary support staff, including clerical and secretarial help, research assistance and perhaps qualified legal assistance. He would clearly have to maintain close liaison with local Provincial Court Judges, court administrators and any local supervising Justices of the Peace. I assume that if my proposals are adopted, or any substantial part of them, there will be a great deal of work involved in assessing workloads, the needs for each locality, the appointment, where possible, of full-time Justices of the Peace and the assessment of "circuit systems" or "area Justices of the Peace", and the classification of part-time Justices of the Peace.

I therefore recommend that the office of the Associate Chief Judge (Coordinator of Justices of the Peace) consist of all support staff that is considered necessary for the carrying out of all the functions and duties recommended in these proposals, including any legal research assistance that is required.

10. Liability and Protection

Many Justices are concerned over the question of their personal liability for acts done by them and the limited nature of the protection afforded them, and in view of the somewhat confused state of the law this concern may be justified. I cannot state with any great assurance what the law is, nor, I suppose can anyone else, but certainly the provisions of the Public Authorities Protection Act appear to proceed on the assumption that a distinction is to be drawn between acts done maliciously within jurisdiction (sometimes called abuse of jurisdiction) and acts done without jurisdiction (sometimes called absence of jurisdiction). There is considerable authority for the proposition that in the case of lower courts (or perhaps more accurately courts not of record) judges are liable for acts done within their jurisdiction if done maliciously and for improper motives whereas in the case of superior courts (or courts of record) judges are not so liable. It is said that it is preferable in the case of superior courts to tolerate a malicious and improper judge than open the whole judiciary to vexatious and groundless litigation, but in the case of lower court judges, the prospect of liability is a healthy impetus for rectitude and honesty.

It is also said that since superior courts set the limits of their own jurisdiction, a superior court judge could not be liable for acts done outside his jurisdiction, but that since inferior courts had only limited jurisdiction subject to

the supervision of superior court judges, an inferior court judge could be liable for acting outside his jurisdiction.

These views seem to be maintained by Sec. 717 of the Criminal Code (regardless of its constitutional validity) and Secs. 2 and 3 of the Public Authorities Protection Act, both of which apply not only to "Justices of the Peace" but also to "magistrates" and "Provincial Court Judges" (even though the latter are now said to be courts of record).

I, personally, find both the assumptions and the reasoning little short of grotesque, at least in the twentieth century. Jurisdiction is now almost totally established by statute for both inferior and superior courts, and superior court judges are not immune from criticism or even removal in cases of malfeasance of office.

In any case, exactly what the law is may have been thrown into some doubt by the English Court of Appeal decision in Sirros v. Moore, [1974], 3 All E.R. 776. I do not consider this inquiry to be the proper place for what should be a detailed study (perhaps by the Law Reform Commission) into the personal liability of all judges, both superior and inferior, if any, and the limits of that liability as to acts within jurisdiction and acts without jurisdiction, and as to knowledge or absence of knowledge or reasonable grounds or absence of reasonable grounds or malice or lack of malice.

But I do find it strange to distinguish between superior court judges and inferior court judges in these days of well-defined jurisdiction. Nor do I find the discretionary protection order that can be made under Sec. 717 of the Code or Sec. 7 of the Public Authorities Protection Act particularly satisfactory solution to the problem. Clearly, again one would have to consider the applicability or non-applicability of some sort of liability insurance coverage and its appropriateness to holders of judicial officers.

In short, without further study and considerable research and evaluation of the policy issues involved, I do not feel able to make any proposals beyond my recommendation:

That a study be undertaken by the appropriate person or body into the question of the liability of all judges, including Justices of the Peace, for acts done in their judicial capacity, whether within or without jurisdiction to recommend clarification of or changes in the law, and to study the appropriateness of liability insurance coverage.

11. Physical Facilities etc.

As I have already discussed, the facilities now provided for Justices of the Peace in this Province range from the acceptable to the appalling so that it seems rather useless to set out criticisms of individual facilities. Rather, it seems to me, one should try to set out standards and criteria that ought to be used as objectives. Fiscal restraint will, I suppose, be a deciding factor in practice, but that does not prevent me, nor should it prevent me, trying to set out basic minimum requirements.

First and foremost, all Justice of the Peace functions should be cleared out of all police stations. Whether the function is adjudication, or conducting a bail hearing or considering an application or an information, a police station is no place for a judicial officer to be working or to be seen to be working. A Justice of the Peace cannot, under any circumstances, be identified with the police.

What is the proper location for a Justice of the Peace to perform his duties if not a police station will, of course, in a large measure depend upon what those duties are. All adjudicative functions must take place in a proper courtroom. Apart from problems that may exist in remote or native communities this seems to be invariably the case and further discussion is unnecessary save that it has been brought to my attention that some Justices of the Peace sit in an adjudicative capacity ungowned -- apparently because the budget will not stand the expense of providing gowns for them. I do not suppose the quality of justice is affected in the slightest by the presence or absence of gowns, but, given our traditions, I should have thought that all sitting Justices of the Peace should be treated alike and either all given gowns to wear or none of them given gowns. It is not the tradition in England for Justices of the Peace to be gowned but I see nothing wrong with the practice and anything that adds to the dignity and decorum of a courtroom is to be encouraged.

The position with regard to bail hearings is rather more complicated. Obviously the public has an interest in the outcome of bail hearings. A very salutary safeguard against sloppy practices, unfairness and short-cuts is to hold bail hearings in a courtroom atmosphere. On the other hand, bail applications may have some urgency to them not normally associated with adjudicative proceedings; often, the accused himself is interested in getting the matter disposed of as expeditiously as possible; it may be quite impractical to expect courtrooms to

be opened or to remain open (with all the necessary attendant staff) for the possibility of one or two bail hearings.

One argument I do not subscribe to is that because as a general principle all criminal trials should be held in open court (i.e. a courtroom to which the public has access), therefore all bail hearings should be held in open court. A bail hearing is not a trial and the principles applicable to trials do not necessarily apply to bail hearings. If bail hearings must be held in "open court", it must be for reasons of their own -- not because one can argue by analogy from trials. That is to say, it must be because the reasons of interest of the public, safeguards against unfairness or short-cuts, outweigh practical convenience and the personal interests of the accused in quick disposition of the hearing.

Until there is some authoritative decision, I can only hazard my own view that where possible and practical, bail hearings should be held in a courtroom open to the public, with all the dignity and decorum associated with it, but that this is not an absolute requirement and that bail hearings may, without impropriety, be held in other places. I still do not like, however, bail hearings being held in police stations, however convenient from a police point of view that may be. The atmosphere cannot be seen to be objective and judicial though I am sure that in many, if not all the cases, it is done in the interests of the accused.

At the very least, I would suggest that if bail hearings cannot be conducted in courtrooms, then facilities should be provided that approximate a courtroom-like atmosphere, where a Justice of the Peace can preside with dignity and judicially. Subject to any authoritative decision, my own view is that such facilities do not necessarily have to be "open to the public" for the bail hearing to be valid. In short, I think we must stop the slide towards the informal, random and haphazard approach toward bail hearings that we are in danger of adopting and restore to them the formality and judicial attitude they should have.

Another bone of contention has been the scrutiny of sureties, once the conditions for bail have been decided upon. For example, bail has been set in the sum of \$5,000 with two sureties. The accused will be detained until the two sureties come forth and are found to be sufficient. If the case of Linford v. Fitzroy (1849), 13 Q.B. 240 is still good law, it is probably true to say that one cannot separate the act of determining release and the conditions of release from the act of determining whether the sureties are sufficient so as to call

one judicial and the other administrative -- they are both part and parcel of the determination of whether the accused is released or is detained in custody. (Compare my comments in Section (8) above on s. 12(j) of the Crown Attorneys Act). But clearly the process of enquiring into whether the accused is to be released is different from the process of enquiring, once the decision to release him has been made, as to whether his proffered sureties are acceptable. While, for the reasons stated, I do not think that this latter process has to be held in "open court", it seems to be highly desirable that it be held in an atmosphere where the solemnity of the occasion can be impressed upon the sureties, where they are made aware of the gravity of their undertaking and where the Justice of the Peace can consider the matter with impartiality and dignity. Some mean or dirty cubby-hole is simply no place for this to be achieved. I hesitate to set out specifics, but I see no objection to stating that in general such facilities should consist of a room large enough to accommodate the Justice of the Peace at a desk at one end before which there should be sufficient chairs to accommodate the proposed sureties spaced some distance from the desk; a police officer or other officer should be in attendance and the accused himself should either be in attendance or at least available in circumstances of whatever security is appropriate in each individual case. Very few of the present facilities seem to measure up to these standards, and what worries me is less the affront to the dignity of the Justice of the Peace than the fact that inadequate facilities cannot possibly be conducive to the surety or sureties understanding the solemnity of the undertakings they are giving.

As far as the non-adjudicative functions of the Justice of the Peace are concerned, that is the considering of applications and informations or the swearing of affidavits or subpoenas, the variables are so great that even generalities are difficult. Let me again point out though that while these functions are non-adjudicative, they are still decision-making and still a vital part of the criminal justice system. Where, therefore, and under what conditions should these functions be performed?

My first consideration is the public. As I have already stated, a Justice of the Peace should be accessible to the public and in a place to which the public feels it has free access. If a private person wishes to lay a complaint, he must not be intimidated from doing so. He may wish to lay a complaint against a police officer and in that case, but equally in any other case, a police station is not the place for a Justice of the Peace to have his office. As I have already discussed also, while I understand that it may be efficient and

convenient for a Justice of the Peace to have his office in his private home, and while I agree that that is preferable to having it in a police station, it is practice to be avoided since it is not to be seen as a place accessible to the public.

It is often not realized that no small part of a Justices of the Peace work can be the provision of "over the counter" services to the public. To say that a Justice of the Peace often adopts the role of a father figure may be something of an exaggeration, but the public must feel that, if they have a complaint, whether against a private person or against a police officer or official, they have someone to whom they can go for objective and impartial assistance in initiating proceedings. The police, of course, perform this function; often the Crown Attorney will provide assistance to members of the public. But it is the Justice of the Peace who is aloof from any suggestion of "taking sides". In many cases, even if process is not issued or the complainant is told that his complaint is groundless, he will be satisfied that someone impartial and in a position of some authority, has listened to him and advised him.

This is why I am firmly of the view that all Justices of the Peace in their non-adjudicative function should have an office in some "public" building -- preferably a courthouse -- where complaints can be considered privately and with dignity.

It may well be that this function of Justices of the Peace will increase in the future. Problems can arise where process is issued on a private complaint unless someone advises the complainant as to the next steps he should take such as preparing his documentation, obtaining subpoenas and generally preparing his case. If this is not done, often he comes to court totally unprepared or, if the Crown Attorney intervenes, the case collapses for lack of evidence. Perhaps the complainant should merely be advised to see a solicitor in some cases. But in general it is not very helpful to a private complainant to have his information received and process issued and then to be left totally to his own devices. I am not entirely sure in my own mind that this is traditionally a proper function for the Justice of the Peace but I see no reason why it should not develop into such. Again, if the Justice of the Peace is seen as the one person who can give dispassionate and objective advice to the ordinary citizen, such a function should be encouraged.

I might add, at this point, that one principle that we must preserve is the right of the private citizen to lay informations and prosecute if a case is made out. I do not know

whether the number of private informations is increasing or decreasing or remaining stable. I get the impression from people I have spoken to (though it is only an impression and not supported by data) that perhaps, in the case of private informants particularly, more use should be made of the information inquiry - the so-called pre-enquête. Actually, the present practice seems to vary considerably - some Justices of the Peace will always hold a more formal inquiry in the case of private informants, others will issue process merely on an ex parte hearing of the informant. I suppose so much depends upon the circumstances of each case, but it is possible that we shall see more use being made of a formal information inquiry in the future and if this is the case, one must be prepared to provide the extra manpower that will be needed.

But one must accept the simple practicability of the matter that the overwhelming majority of applications, informations and other occasions upon which the services of a Justice of the Peace will be required will be at the instance of the police. I see nothing wrong, therefore, with suggesting that the offices of the Justices of the Peace should be as convenient for the police, as possible, consistent with the first proposition I advanced -- that is to say a public building to which the public feels it has access that is not a police station but is as convenient for the police as is practicable.

I cannot object too strenuously to the location of justices' offices in their own private homes in the smaller communities. As I have indicated, I do not think it is a desirable practice, but presumably in such communities, the Justice of the Peace will be known to most members of the public and they should not have the same reluctance to approach him that would be the case if he were a stranger and in a larger community.

Given that the location is decided upon, the next question is what facilities should be provided. In the previous chapter, I outlined my views on what office space is desirable -- somewhere reasonably private, not perhaps to the extent of providing a private office for each Justice of the Peace, but certainly to the extent of providing him with some place where he can keep private documents and papers, where he can work and study and, above all, some place where informants can be interviewed in private and, if the occasion arises, counselled. In addition some modest library and reference facilities should either be provided or made available. Indeed, in the larger urban centres, it may be possible to make a library grant to the Justices of the Peace to be used for the purchase of reports, periodicals or texts which they may have occasion to use.

The paperwork involved in the duties of Justices of the Peace is enormous and probably increasing. I cannot think it is fitting to expect Justices of the Peace to type up their own documents or to type up documents for other people. Indeed, not only is it not fitting, it is simply a waste of experience and of time. The provision of necessary secretarial and clerical services is not a luxury but an efficiency, yet as far as I can estimate, there has never been any effort made to determine even the basic needs of Justices of the Peace for such services. I have no doubt that some of the large areas are, if not well, at least adequately serviced but there are still far too many justices in the smaller communities who could legitimately use the services of at least a part-time or shared secretary.

As I have indicated, there is some concern also among Justices of the Peace in the larger centres about their lack of safety and security. They do come into close contact with members of the public and, indeed, their offices must be accessible to the public. They, or "sitting" Justices of the Peace at any rate, do adjudicate, release accused persons or order them detained, scrutinize sureties and decide whether they are acceptable or not. The unfortunate fact is that there have been incidents where the physical safety of some Justices of the Peace has been threatened. Their worry is real and legitimate.

Justices of the Peace should not have to shoulder their way through waiting members of the public in order to reach or leave their courtrooms; they should not have to use public washroom facilities. It is not asking too much (personally, I find the request entirely reasonable) to ask that appropriate steps are taken to ensure their personal safety. Unfortunately, many buildings now used by Justices of the Peace are antiquated and badly designed for such specific purposes, but I cannot imagine that, at some small cost, improvements could not readily be made. Private access to the rear doors of courtrooms should be provided; private washroom facilities should be created. In addition, alarm systems, alternative exits, or, if not the presence, then at least the availability of security personnel, seem to me something that could be arranged without difficulty.

I therefore recommend:

- (1) That all Justice of the Peace offices be removed from police stations and placed in some appropriate building divorced from the police though as convenient for them as possible;

- (2) That private houses should not be used as a Justice's of the Peace working office, save in smaller communities and then only if no more suitable alternative arrangements can be made;
- (3) That all adjudicative functions be performed in courtrooms with appropriate dignity and solemnity;
- (4) That all bail hearings be conducted as far as possible in courtrooms and, where this is not possible, in rooms that are conducive to the appropriate dignity and solemnity of the proceedings;
- (5) That police stations should not be used for bail hearings save in exceptional or urgent situations;
- (6) That the process of scrutinizing sureties be carried on in an atmosphere of formality and solemnity and that the facilities used for this purpose reflect this;
- (7) That the office facilities provided for Justices of the Peace be located where the public has easy access to them, but that they be private and provided with such safety precautions as are deemed necessary in the circumstances;
- (8) That modest library facilities be provided in the larger centres for the use of Justices of the Peace, and that in any case, library facilities be made available to all Justices of the Peace, whether by providing them with their own, or by making existing libraries accessible to them;
- (9) That adequate secretarial and clerical assistance be provided for all Justices of the Peace as the need indicates, either on a full-time basis or on a part-time or shared basis.

12. The Oath

This is a small matter and not obviously within my terms of reference but it is one that I should like to deal with. I deprecate the current practice of having Justices of the Peace take their oaths of office privately in the Judges'

Chambers. The appointment as a Justice of the Peace is no small matter and the taking of the oath an occasion of dignity and solemnity. In my view, it should be done in open court before the appropriate Provincial Court Judge, with the Justice of the Peace gowned if he is appointed a "sitting" or Presiding Justice of the Peace and ungowned if he is appointed a "non-sitting" or Justice of the Peace, non-Presiding. It seems to me only a courtesy that other Judges and Justices of the Peace should be present if they are available and that the relatives and friends of the appointee be invited to the ceremony.

I therefore recommend that all Justices of the Peace take the oath of office in open court before the Provincial Court Judge.

13. The Justice of the Peace and the Community

I have already pointed out that perhaps the least understood role of the Justice of the Peace is that of hearing and considering informations. It is in this area, more than any other that the relationship between the Justice of the Peace and the community he serves must be examined. As I have proposed, the Justice of the Peace must be accessible to the public; his office must be and must seem to be, open to the public. In many cases, he must act as a sympathetic "ombudsman" for aggrieved citizens, listening to their complaints and offering advice and understanding, even if he decides that there is no case to answer.

I am firmly of the view that there is a crucial role to be played by Justices of the Peace in reversing the general disaffection with the criminal justice system entertained by many people. This report is not the place to examine the causes for this disaffection nor to document its existence. It may be that I am overly pessimistic and that there is, on the contrary, complete satisfaction with our present system but, without being able to prove what I say, I do not think this to be the case. All members of the public must be assured that there is someone they can go to with their complaints who is perceived by them to be impartial, considerate and patient. I repeat what I said previously viz. that in many cases, it is not the outcome of the complaint (i.e. whether process is issued or not) that is important, but the fact that the complaint has been heard. I think it would be even more beneficial if Justices of the Peace were to explain to complainants the reasons for coming to a particular decision, if he were to give them advice on what the next steps to be taken should be, if more use were made, in appropriate cases, of the more formal information inquiry. Of course, many Justices of the Peace already adopt these practices

and they are to be commended but the plain fact of the matter is that full-time Justices of the Peace are too pressed to devote as much time as they would like to "counselling" private complainants and, as far as fee Justices of the Peace are concerned, so long as we have an iniquitous piece-work fee system, there is no incentive for such matters. I would hope that if my proposals are accepted, both of these problems would, in time, disappear, restoring the Justice of the Peace to the position he once held in the community.

This leads me to consider a matter of some delicacy but one that must be tackled. The "community", in the context of Ontario, is not a homogeneous entity, but, as has often been said, a mosaic of people from different cultures and ethnic backgrounds, of different colours and of different mother tongues. To say that all are treated equally and that justice is done to all equally, is not the same as saying that this is perceived by them to be the case. One's perception is coloured by external factors, by what is visible or by what is stated.

A Justice of the Peace, whether presiding in court or listening to a private complainant, no longer deals solely with the mythical average man. The man in the Toronto omnibus is now as likely to be a Rastafarian from Jamaica or a Sikh from Punjab as a native Torontonians.

If the Justice of the Peace is to perform this "community service" function as I think is the case, the first question that arises then is whether Justices of the Peace as a group should reflect the make-up of the community in which they work. Should, in other words, each area have, proportionately, the same number of minority group Justices of the Peace as exist in that area? In the best of all Utopian worlds, I suppose the answer is that the question simply would not arise - if my proposals regarding the advertising vacancies, the soliciting of applications and the vetting by the Justices of the Peace Review Council are accepted, it would follow that appointments would generally reflect the make-up of the community from which the applications are received. But that world is some way off, and in the meantime it seems to me that, in the interests not of justice but of the perception of justice, some efforts will have to be made to ensure that Justices of the Peace do reflect to some extent the constituent elements of their communities.

At the same time, I abhor, on the one hand, any idea of a quota system and, on the other hand, any idea of tokenism. Given good will on the part of the Justices of the Peace Review Council and of the Ministry itself, I think nothing more need be said than that all parties should be conscious of the problems

and that, other criteria being satisfied, efforts should be made to solicit applications for the position of Justice of the Peace from qualified members of minority groups and that all future appointments try to reflect the make-up of the community they serve. Let me reiterate my proposition that this should be so not because justice and equality demand it but because the perception of justice and equality demands it.

I repeat the last point because I do not wish anything I have said to hold any implication that Justices of the Peace who are not members of minority groups are not scrupulously fair and just when dealing with members of minority groups. A complainant or an accused who is black or who may have trouble with fluent English or French or who may look different, may be treated scrupulously fairly but feel that he has been discriminated against. The Justice of the Peace may not realize that he has to be more patient, to explain more carefully the reasons for his decision, to offer more detailed advice than might otherwise be the case. However fair and just we may appear to be to ourselves, that fairness and justness must be visible to the recipient.

What I say, of course, applies to all persons who deal with members of the public, whether Justices of the Peace or not, but I think it would be salutary if some part of the Justice of the Peace's initial training programme included some exposure to handling situations involving racial and other minority group sensitivity. The Human Rights Commission has the expertise to handle this and I would suggest that it be consulted on the matter.

There are other, quite simple, steps that could be taken to forestall disaffection. Signs could be posted advising complainants that interpreters are available if they prefer; a leaflet could be produced explaining in simple terms, the next steps to be taken by a private prosecutor who has successfully laid an information; a pamphlet could be made available explaining the function of a Justice of the Peace and the right of a private prosecution to initiate criminal proceedings and explaining the role of the Crown Attorney and so on.

I do not think that any of the points I have made need to be put in the form of formal recommendations. Most people I have spoken to are aware of the, not so much problems, as general feeling of disquiet and the need to head off problems before they arise. There is a general willingness on everyone's part to achieve this. I should caution that it may require an increase in the number of Justices of the Peace, particularly in the urban areas; it may require more resources being put into

this "community relations" aspect of a Justice of the Peace's work. Again, I can only say that I have no doubt that it will be worth it.

14. Transitional

I am conscious of the fact that I have recommended some sweeping changes and if only a part of them is implemented, one has the problem of what to do in the meanwhile.

One simple solution that has previously been suggested is to revoke the Commissions of all Justices of the Peace and make a completely fresh start. I have to reject that for two reasons, the first being that I do not think the administration of justice in this Province could weather the chaos that would result in the transitional stages and the second being that I think that such a solution would be grossly unfair on all those present Justices of the Peace who have served loyally and with dedication up to now. Even if reappointed, to leave them in a state of uncertainty while a decision was being made, would be most inequitable.

Nor, for the same reasons, do I think that my proposals as to a minimum age requirement of Grade XII should apply to anyone presently holding a Commission. It would be very inefficient to dispense with the services of experienced Justices of the Peace merely because, after the event, they do not meet the necessary standards for appointment in the future.

One obvious place to begin would be to revoke the Commissions of all those Justices of the Peace who are now inactive -- that is to say, all those Justices of the Peace who have submitted no fee account within the past twelve months. If my figures are correct, well over 100 Justices of the Peace fall into this category. In the second place, the Commission of all those "civil servant" Justices of the Peace who have since ceased to be members of the civil service should be revoked since the reason for appointing them in the first place no longer exists.

On more substantial matters, I do not think it possible to begin any changes until the appointment of the Associate Chief Judge (Coordinator of Justices of the Peace) and the organization of his office, since so many of my recommendations depend upon his functions. I would suggest, therefore, his immediate appointment, with a budget sufficient to establish his office and the immediate establishment of a Justices of the Peace Review Council, restructured along the lines of my proposals. All future appointments as Justice of the Peace should

be scrutinized by that Council before being submitted to the Attorney General.

At the same time, the principles I have set out regarding security of office, pensions and retirement benefits should be incorporated into a new amended Justices of the Peace Act -- in the first instance, I would suggest, to be limited to full-time salaried "Public Service" Justices of the Peace, as they are now called, until the reorganization of the whole system of Justices of the Peace can be effected.

The next fairly straightforward step, could be the establishment of the training and continuing education programmes that I have recommended. It seems to me it would be rather a waste of time and money to require all present Justices of the Peace to undertake a training programme, when many of them have already had years of experience, even if few, if any of them, would have undergone the sort of training curriculum I have outlined. Perhaps the solution to that would be to make a training programme available for any present Justice of the Peace who wished to attend and who felt that he would derive some benefit from it or from some part of it, and make it compulsory for all new appointments.

A programme of continuing education or upgrading seminars could and should be launched immediately -- probably to begin with not on any large ambitious scale, but sufficient to get the programme started. Similarly, the practice of circulating all Justices of the Peace with copies of recent judgments, items of interest, and so on should commence as soon as the office of Associate Chief Justice has been organized.

I see no reason, either, why an immediate survey could not begin of all Justices of the Peace facilities in the Province and such structural and physical alterations as are necessary to meet the standards I have recommended begin as soon as practicable. This may have to consist in providing totally new quarters in some locations and in upgrading present facilities in others. The offices of all Justices of the Peace presently located in police stations should be removed therefrom immediately.

The salaries of all full-time Justices of the Peace ("sitting" and "non-sitting") should be increased immediately. They are at present quite inadequate, but since the salary structure I propose is dependent upon the abolition of "extras", "per-diems" and fees, and since this abolition will take some time to accomplish, it may be that salaries should not be increased immediately to the levels I have suggested. For the

same reason, while I think the present fee structure is also on the low-side, rather than suggest increasing the fees, I would hope that they will be abolished altogether.

Another step that should be taken immediately is the amalgamation of all A Expanded, A and B Directions with the one category of Presiding Justice of the Peace and the amalgamation of all C and D Directions into the one category of Justice of the Peace, non-Presiding. At the same time, all "administrative" Justices of the Peace (regardless of their present direction) should be reclassified as Justices of the Peace, non-Presiding, and if that means that a shortage will occur of Justices of the Peace to preside at trials or bail hearings, then more Presiding Justices of the Peace should be appointed to make up the deficiency. The sooner we stop having civil servants sit in any adjudicative capacity whatsoever, the better, however "convenient" or "practical" it might be. Perhaps, faced with this choice, many present "administrative" Justices of the Peace, would prefer to relinquish their civil service appointments to become exclusively Presiding Justices of the Peace, and in that case, I see nothing wrong with giving them the first choice in any new appointments, rather than waste the expertise they possess.

Then, I think, will come the difficult process of the implementation of any of my recommendations that are accepted as to the restructuring of the entire Justice of the Peace system, and this will require the gathering and analysing of statistical data. I do not underestimate the difficulty involved, but if my objectives are agreed with, it must be done. It is simply not possible to continue the way we are at the moment -- unorganized, and inconsistent. Workloads must be examined and the needs of each area specifically determined and sufficient full-time salaried Justices of the Peace appointed for those needs. A determination should be made of which areas or groups of communities could support a "circuit" or travelling Justice of the Peace full-time. At this stage, I should think it will then be possible to terminate the Commissions of all those fee Justices of the Peace no longer required.

At the same time, it should be possible to begin classifying all remaining Justices of the Peace who are presently paid on the fee system as to which of the three categories -- quarter, half or three-quarter time -- they belong to, and fix their salaries and terms of appointment (or reappointment) accordingly.

Once that is done, the provisions respecting security of office, partial pensions and proportionate disability pay

should be made applicable to all part-time Justices of the Peace.

In short, I do not think any attempt to achieve instant reorganization is the proper approach. Some of my recommendations should be able to be implemented immediately without adverse repercussions -- indeed only, I would hope, with benefit and without disrupting the administration of justice. Others should be effected gradually -- over, I would venture to suggest, a two or three year period.

1. (i) That all Justices of the Peace be classified into either Presiding Justices of the Peace or Justices of the Peace (non-Presiding). Presiding Justices of the Peace should have all the powers and duties now encompassed by an A Expanded Direction; Justices of the Peace (non-Presiding) should have those powers and duties now encompassed by a C Direction.
- (ii) That no court administrator be appointed a Justice of the Peace unless it is demonstrated to be necessary and then only as a Justice of the Peace (non-Presiding). No court administrator should ever be appointed a Presiding Justice of the Peace.
- (iii) That the functions of all Justices of the Peace should be limited to those of a decision-making character. All the routine signature affixing functions should be transferred to Commissions of Oaths.
2. (i) That the appointment of all Justices of the Peace be as either Presiding or non-Presiding Justices of the Peace by Order-in-Council.
- (ii) That their status should only be changed after due process.
- (iii) That an office of Associate Chief Judge (Coordinator of Justices of the Peace) be established to have general responsibility for the supervision and organization of all Justices of the Peace.
3. (i) That Grade XII be established as the minimum educational requirements for all new appointments as Justice of the Peace.
- (ii) That vacancies for appointment be determined by the Associate Chief Judge and submitted to the Attorney General for approval.

- (iii) That vacancies be advertised and applications invited.
 - (iv) That no appointment be made without an interview by the appropriate Provincial Court Judge and, following a favourable report from him, without the approval of the Justices of the Peace Review Council.
- 4.
- (i) That all new appointees be required to attend a training programme, consisting of some reasonable in-depth study of theory and practice, and be required to spend some time in some sort of apprentice training.
 - (ii) That such training programmes be provided for both Presiding Justices of the Peace and Justices of the Peace, non-Presiding.
 - (iii) That a package of all relevant material be provided for all new appointees.
 - (iv) That a comprehensive programme of continuing education be established.
 - (v) That the cost be borne by the Province and should include all living and travel expenses.
 - (vi) That the responsibility for developing these programmes rest with the Associate Chief Judge.
- 5.
- (i) That all Justices of the Peace be full-time appointments wherever possible.
 - (ii) That consideration be given to the appointment of "circuit" or "area" Justices of the Peace wherever appropriate.
 - (iii) That all fees be abolished and that all non-full-time Justices of the Peace be appointed on a partial salary basis.
 - (iv) That the needs, in terms of numbers and classification, of the Province be determined and Justices of the Peace be appointed accordingly.
 - (v) That more study be made of the orderly and efficient scheduling of court sittings most convenient for the public.

- (vi) That the terms of appointment make it clear at what times and places all Justices of the Peace will be expected to be on duty.
- 6.
- (i) That a mandatory retirement age of 70 years be established.
 - (ii) That appointments of court administrators as Justices of the Peace terminate when their civil service appointments terminate.
 - (iii) That all Justices of the Peace should enjoy security of appointment subject only to dismissal for cause after due process proceedings.
 - (iv) That "cause" in this context be clearly defined and "due process" be given statutory force.
 - (v) That all hearings for cause should be by the Justices of the Peace Review Council.
 - (vi) That the Justices of the Peace Review Council be composed of:
 - (a) The Associate Chief Judge
 - (b) One Provincial Court Judge (Criminal Division)
 - (c) One Provincial Court Judge (Family Division)
 - (d) Two full-time Presiding Justices of the Peace.
 - (vii) That no salary of a Justice of the Peace should be withheld pending investigation.
 - (viii) That, in appropriate cases, a Justice of the Peace may be suspended from duty, with pay, pending an investigation.
 - (ix) That an acceptable long-term disability scheme be established.
 - (x) That an acceptable pension scheme be established.
- 7.
- (i) That all full-time Justices of the Peace be paid on a salary scale ranging from \$25,000 to \$45,000 over a fifteen year period.
 - (ii) That all full-time Justices of the Peace non-Presiding be paid on a salary scale ranging from \$19,000 to \$39,000 over a fifteen year period.

- (iii) That all non-full-time Justices of the Peace be paid a proportionate salary.
 - (iv) That all non-full-time Justices of the Peace be classified as quarter, half or three-quarter time Justices of the Peace.
8. (i) That the assignment of all Justices of the Peace be the responsibility fo the Associate Chief Judge with power to delegate.
- (ii) That the Associate Chief Judge establish a service for providing Justices of the Peace with advice and assistance.
- (iii) That a court be established with power to issue binding directions on all Justices of the Peace in matters of law or procedure.
9. That the office of Associate Chief Judge be furnished with all support staff and budget facilities necessary to enable him to discharge his responsibilities.
10. That a study be undertaken to enquire into the whole question of the personal liability of all judicial officers for acts done in their judicial capacity.
11. (i) That no Justice of the Peace office should be in a police station.
- (ii) That, generally, private homes should not be used to have Justice of the Peace offices.
- (iii) That all adjudicative functions be performed in courtrooms.
- (iv) That all bail hearings be held in places that reflect the dignity and solemnity of the occasion, and in principle, should not be held in police stations.
- (v) That the process of scrutinizing sureties be done in an atmosphere of formality and solemnity.

- (vi) That office facilities be provided for all Justices of the Peace to which the public has ready access, but that they be private and reasonably secure.
 - (vii) That appropriate library and research facilities be provided or made available to Justices of the Peace.
 - (viii) That adequate clerical assistance be provided.
12. That the oath be administered in open court.

